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ABSTRACT

The six articles in this collection deal with theoretical and practical freedom of speech issues. Topics covered are (1) freedom of expression and the Mormons for the Equal Rights Amendment (R. J. Jensen); (2) the U.S. Supreme Court and the First Amendment (W. A. Linsley); (3) antipornography campaigns (R. McGaffey); (4) the human rights advocacy of El Salvador's Archbishop Oscar Romero (J. E. Schuetz); (5) foreign travel as a First Amendment right (R. S. Rodgers); and (6) 19th century speaker bans (J. A. Samosky). A bibliography of materials pertaining to freedom of speech is also included. (JL)

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FREE SPEECH YEARBOOK 1982

Volume 21

Editor: Henry L. Ewbank

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Tucson, Arizona

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The H. A. Wichelns Memorial Award for the most significant contribution to the Free Speech Yearbook was established in 1974 to honor Herbert Wichelns, a pioneer in the speech communication discipline and an early advocate of the importance of the speech-law aspects of speech communication.

1982 Award Recipient: Raymond S. Rodgers,
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FREEDOM OF EXPRESSION: THE MORMONS FOR ERA*

Richard J. Jensen
University of New Mexico

Much of the discussion concerning free expression occurs in political forums and involves the rights of citizens to speak openly about their opinions and beliefs. Frequently, however, free expression as an issue appears in controversies within institutions of business, education, and religion. While free expression is encouraged by the government, private institutions often have policies and norms that promote secrecy within that group, require oaths for public silence, and dismiss those who express contrary opinions.[1]

In particular, the leadership of churches promotes dogma and policies which often preclude the rights of free expression granted by the larger political society. For example, some religious groups prohibit their members from dancing, playing cards, drinking alcohol, working on religious days, accepting types of medical care, reading certain books, viewing certain films, or dressing and speaking in ways that call unnecessary attention to the individual. Many policies of churches conflict with those sanctioned by the state. The proposed Equal Rights Amendment, for example, is a policy of the state that has generated a great deal of controversy among church leaders in the Catholic, Southern Baptist, Jewish, and Mormon religions. In these situations church spokespersons have taken public stands for or against this amendment and encouraged their membership to follow the church's position.[2]

Many members of church congregations have not been silent on the Equal Rights Amendment. Instead of remaining quiet, they have openly challenged the positions of church leaders. Some members have demanded additional rights such as ordination of women and changes in admission policies of seminaries. Other, more conservative members have renounced the ERA and warned women to stay home and spend more time with the family.[3]

The ERA has reignited the controversies over the rights and roles of women in organized religions. One of the more striking and well-publicized challenges to a religious hierarchy over the issue of the ERA was mounted by Sonia Johnson through an organization called the Mormons for ERA.[4] Johnson publicly disagreed with the Mormon Church (Church of Jesus Christ of Latter-Day Saints) by favoring the ERA and by opposing the long-standing positions of the church concerning family life. For her actions, Johnson was excommunicated.

Columnist Ellen Goodman describes the excommunication of Ms. Johnson as another example of the contemporary treatment of women in traditional religions: "Hers is the most extreme . . . example of what is happening to men and women in many other traditional, fundamentalist religions--men and women advocating change in a time of entrenchment. From Sister Teresa Kane, the nun who spoke up to the Pope, to William Callahan, the priest being 'reassigned' because he believes in women clergy, there is renewed hostility from many hierarchies. Women again offered specious special privileges in return for a shroud, and allotted a place only as long as they will stay in it."[5]

To illustrate the acceptance of Ms. Goodman's ideas by the Mormons for ERA, Christine Rigby Arrington states:

* An earlier version of this paper was presented at the Speech Communication Association Convention in Anaheim, California, November, 1981. The author thanks Janice E. Schuetz, of the University of New Mexico, for her input on an earlier version.

> She (Sonia Johnson) represents a movement that surfaced in 1974 when eleven Episcopal women were ordained to the priesthood without their church's blessing. They were soon joined by Catholic women, and in 1979 Sister Teresa Kane stood publicly before the Pope and asked him to consider 'the possibility of women as persons being included in all the ministries of the church.' Now 9,000 of some 128,000 American nuns belong to the organization calling for equality. Some Orthodox Jewish women have joined the movement, and literature on women and religion have multiplied like the fishes and loaves.[6]

Ms. Arrington describes Johnson as "the leading spokeswoman for an emerging group--feminists of faith--she has become a symbol for the confrontation between a belief in the church and a belief in the value of the individual--even if that individual is a woman."[7] These "feminists of faith" believe that "there is an unmistakable restlessness among church women."[8] They state that the issue of feminism may be the next major battle faced by the male hierarchy of the Mormon church. They define this battle as being "more painful than the church's long struggle with the question of equality for blacks."[9] They see the issue of women's rights as being even more controversial than that of blacks because blacks constitute only a small percentage of the church's membership while at least one-half of the church's members are women. As one feminist states, "there's one of us in nearly every bedroom."[10] Johnson believes that women's issues will cause such significant changes that in fifty years no traditional church will exist in its present recognizable force.[11]

The Mormons for ERA argue that the excommunication of Sonia Johnson is just an example of the long history of suppression of women's dissent: "For the cause of civil rights for all American women, at an earlier age, Sonia Johnson might have been burned at the stake. In a later age, imprisoned and force-fed. More recently locked in a mental asylum. Now, in the United States of America, in the twentieth century, she is on trial for her religious life for disagreeing politically with the Mormon brethren. And her real sin . . . she would not be quiet."[12]

In her book, From Housewife to Heretic, Johnson links the Mormons for ERA to feminists in other religions: "We certainly were not the first group of Mormons for ERA in this country, but we seemed destined to be the ones to get most of the recognition. . . . And we were certainly late on the general religious scene as religious feminists working within our church for change. Everywhere churchwomen have been having similar problems and experiences for well over a decade, all of us part of a religion revolution unparalleled in the written history of the world--the democratization of the most hierarchical structure humankind has ever known."[13]

The Mormons for ERA have touched off a debate in Mormon society that threatens to be more painful than the previous controversies in the church. This controversy typifies the struggle of persons and groups who seek to voice their opinion on issues that differ from the official position of church leaders.

Normally, the institutional church quietly encourages dissenters to keep their silence or withdraw from the church. However, when dissenters fight to keep both their church membership and their unorthodox opinions, the church often takes official action to excommunicate or cancel membership of its members. Such was the fate of Martin Luther and Henry VIII.

Whereas most dissent against churches in the past concerned social issues like war, voting, segregation, and dogma, much of the current controversy centers on the role of women in the church. Thus, this essay is concerned with women, churches, and free expression.

This study focuses on the Mormons for ERA for several reasons. First,

they use the forums of free expression--television, newspapers, and public meetings--to publicly attack the leadership of the Mormon church. Second, they represent other women advocates who have challenged the positions of their churches against women. Third, their case demonstrates the problems of free expression resulting from conflicts between public policy and church dogmas and values. Fourth, they officially lost their dispute with the church in the sense that Johnson is excommunicated, but they publicly win because they "raise the consciousness" of the public about Mormon women.[14] Finally, the argumentation of the Mormons for ERA typifies many of the problems and risks of advocacy for free expression within private institutions.

In order to illustrate the problems of the Mormons for ERA in freely expressing themselves, this paper will focus on: 1) a discussion of the power of excommunication within the Mormon church; 2) details of how Mormon feminists are forced to choose between their religion and their support of the ERA; and 3) a description of how these feminists feel they have been forced to challenge their church on women's issues.

Excommunication as a Weapon

No members of the Mormons for ERA attempt to deny that the Mormon church has the right to excommunicate a member. They refer, however, to the power that the church has over the lives of its members because of the adverse effects of excommunication. In the case of Sonia Johnson, excommunication changes her entire existence: "Today Sonia Johnson stands excommunicated. She is no longer allowed to fully participate in the religious rites of the church, and according to Mormon doctrine, she will never in the afterlife join the family she worked so hard and lovingly to raise in her life."[15] If a person accepts the doctrines of the Mormon church and looks to spending a future of eternity with her family, excommunication would be a powerful punishment.

Aware of this kind of power over their lives, Mormon women have a difficult time questioning their church leaders, especially if they perceive the power as being used capriciously. Not only are they concerned about the power being used indiscriminately, but they charge the church with using its dominance with great vengeance against dissenters: "Over and over members write of being threatened with excommunication for mere disagreement with Church practices, reluctance to wear temple garments, inactivity, or refusal to let the home-teacher into the home."[16]

In the specific case of Sonia Johnson, the Mormons for ERA point to thinly-veiled threats made by the president of the church, Spencer W. Kimball. In 1979 Johnson quotes Kimball's statement that members who support the ERA should be "'very, very careful' because the Church is led by 'strong men and able men. . . . We feel we are in a position to lead them properly.' The threat here is open and clear. We had better be very, very careful."[17] Later in that same year, while awaiting the decision in her case, Johnson stated that the church was forcing its members "to support selected ultraconservative political causes by threats of excommunication."[18]

Johnson's excommunication is viewed by some members of the Mormons for ERA as "a very clear lesson from the brethren. . . .Women in the Church are to be seen not heard."[19] Others condemn the act: "Excommunicating a political opponent was a dastardly act. Most Mormons know of cases where thieves and violent individuals have been spared excommunication, and as lay preachers, we are accustomed to hearing all kinds of 'false doctrine' from our pulpits. We don't advocate excommunication, but tolerance."[20]

The reaction of some ERA supporters is surprising. Instead of being intimidated by threats of excommunication, they openly challenge church leaders by inviting church sanctions. One member explains: "The Church's attempt to muzzle Sonia Johnson and her subsequent excommunication force me to view the Church as an oppressive and evil force with which I can no longer be associated. . . . Just as I would not tolerate a government that would interfere with free

expression of religion, I cannot condone a church's use of its power to inhibit political expression by its members through a threat of excommunication."[21]

The power of excommunication is supported by the moral force exerted by church leaders. The president of the Mormon church is venerated as a prophet of God by the membership. In the minds of many members, this status as prophet makes it impossible for him to make an error in guiding the organization. The Mormons for ERA see this infallibility as a method of quelling dissent in the organization. They point to remarks like "When the Prophet speaks, the debate is ended" but claim that such statements really mean that "the debate never even got started, since in the Church there is little dialogue or even education. Indoctrination is the prime method of instruction, because obedience is the contemporary Church's prime message."[22] They argue that stifling of dissent has occurred throughout the history of the church, "at all levels of the hierarchy, among men and women alike."[23]

Another area where Mormons for ERA are concerned with the ability to express themselves freely involves the dual role of political and religious leaders by Mormons. In other words, the leaders of the church are often the political leaders in the community. This co-mingling of roles squelches virtually all debate on political issues because "The Influence of Church teachings is pervasive and understood."[24] This control of politics may have led questioning individuals to be quiet concerning the excommunication of Ms. Johnson. In their literature, the Mormons for ERA describe how individuals in the general public were shocked by Johnson's trial and excommunication, but "most Mormons, of course, were silent."[25]

They argue that silence occurs even though the leader of the church has received no revelation stating that members of the organization have to oppose the ERA.[26] Thus, the Church doctrine does not require that individuals have to reject the ERA. Many members of the Mormons for ERA see the excommunication of Sonia Johnson as invalid because there is no support in doctrine for the position of the church. They see the opposition to the ERA merely as the opinion of male church leaders, not a divinely inspired position.

Choosing Between Church and ERA

Johnson claims that her excommunication forced her to choose between being silent inside the church and taking her case to the public through the secular media. When first faced with the decision, she attempted to stay within the organization: "I offered to apologize for any statement I had made that appeared to hurt the Mormon religion. . . . I said I would recant everything except my support for the ERA."[27] Johnson was allowed to attend church services but could not actively participate in the rituals with the rest of the congregation. Most importantly, she was not allowed to speak in meetings, thus she could not spread her message inside the church.[28]

During the consideration of her excommunication Johnson found it difficult to understand the events surrounding the action:

> They do not need evidence, they do not need proof; they would and could say anything they pleased without a single scrap of evidence, and the members of the church would believe it implicitly. I still did not comprehend that the sort of totalitarianism and utter disrespect for individual human rights and processes of justice I associated with countries like the Soviet Union was the system upon which the courts of the church--at least in my case--were working. I was too American to believe it could happen to me. I was too Mormon to believe it could happen in the very institution I had always trusted most to be fair and just and honest. I still thought that somehow my church would come through on the side of these principles. . . .[29]

She disagrees with her treatment by the church: "I stand firm in my belief that the church leaders must allow me the same constitutional right as they have to pursue my politics with freedom, even to the extent of opposing theirs."[30] Not only does Johnson believe that she has a constitutional right to speak out but a religious one: "I believe the Lord means for us to have freedom of opinion and speech, for both sides of issues to be expressed so that people can choose."[31]

Johnson argues that one of the major reasons that the popular press picked up her story was the perception by many members of the working press that the dilemma she faced was an unfair one. That dilemma is described by a supporter: "It appalls me that free speech only applies as long as we hew to the line of the majority. I was told in my own case in the Church that I was free to believe anything I wanted, and I still could be a member of the Church. The catch, of course, was that I couldn't preach it. Some freedom!"[32] Johnson chose to go public and quit the church. She now attends Unitarian meetings but would prefer to attend Quaker services because of the lack of a hierarchy in that group. No such group is near her home in Virginia, however.[33]

Although some Mormons for ERA members, like Johnson, are forced out of the church and others choose to leave willingly, some followers of the Mormons for ERA steadfastly argue that the male chauvinist ideas in the Mormon church can only be changed by remaining within the fold. They argue this necessity because "the Mormon Church turns a deaf ear to outsiders. The more numbers we have inside the Church, the more effective we'll be."[34] These individuals concentrate on convincing church participants who support the ERA to speak out. They encourage such actions by openly praising those who have the courage to state their beliefs in public. The Mormons for ERA Newsletter of August 1981 describes a typical praiseworthy case:

> Having her foot in a cast did not keep Cheryl Peel from rising to her feet at the Pacific Palisades Ward's fast and testimony meeting, April 12, to describe to the membership how crucial are free agency and feeling the freedom to act on the dictates of one's own conscience. She said, 'After reading, study, and prayer, I feel strongly that passing the Equal Rights Amendment is terribly important not only for women, but for men--for all human beings. I hope all of you will read, not just what the Church has to say, but all sides of this urgent issue, and come to your prayerful conclusions.' She said it is important to stand up and be counted for what we believe in.[35]

The leaders of the Mormons for ERA believe there are large numbers of Mormon women who secretly believe in the Equal Rights Amendment's passage but are afraid to speak out because of fear: "They fear, as we fear, the harassment, the social ostracism, and the implied rejection that follows upon taking a position different from that" of the male leaders of the church.[36] To those who fear excommunication or other forms of punishment the Mormons for ERA argue that if enough women speak out the male leaders cannot censor such a large group or excommunicate all of them in secret. The feminists then ask the silent women what the absolutely worst thing that could happen to them would be. The answer to the question is made obvious: "By remaining silent, the worst that can happen is already happening. You are living in fear, and you are not free."[37]

Speaking Out

The Mormons for ERA argue that they have always been open and honest in their communication and expect that their opponents will react in the same manner. The actions of the church leaders make it clear that in their minds the male heirarchy is not being open and honest. They believe Ms. Johnson was punished for speaking out honestly by leaders who acted unfairly. These unfair actions forced the women to take the issue out of the confines of the church by appealing to the American public. Marty LaBrosse states that the actions of the male

church leaders were clear in their intentions, however: "The brethren should be complimented because they came up with a very clear object lesson for women in the Church--that women should be seen and not heard."[38] She then outlines her belief that Mormon men "do not believe in equal rights for Mormon women, do not believe in free speech under the U.S. Constitution, do not tolerate opposing views from Church women, and do not tolerate expressions of religious freedom if the expression differs with the male hierarchy."[39] She then expresses her sorrow that the leaders have so eloquently told her that she must be quiet.

LaBrosse charges the church with denying her freedom of expression during a demonstration at the Bellvue Temple near Seattle, Washington. She describes how church officials physically assaulted her while she was picketing the temple: "On November 17, 1980 I was assaulted, knocked down, and kicked by an agent of my Mormon Church--one of my good Priesthood brothers. This was an attempt by my church to intimidate and silence me and I am ashamed of my brothers for this unchristian behavior!"[40] She charges the church with denying her freedom of religion and freedom of expression. She is suing the church because of the denial of her rights.

The Mormons for ERA argue that women's rights and opportunities have been reduced in the Mormon church. This reduction of rights reduces their potential of having any effect concerning the church's stance on women's issues. In 1979 Johnson outlined the church's actions:

> Encyclicals from the Brethren over the past ten years, such as those which took away women's rights to pray in major Church meetings (this has been restored), to control our own auxilliary money and program, and to publish our own magazine for communication among ourselves have put women under total male control, requiring us to ask permission from men in even the smallest matters. These rulings--which have seriously harmed women's self-esteem, lowered our status, made us bootlickers and toadies to the men of the Church . . . reveal the depth of the brethren's fear of independent, non-permission asking women, the kind of women which are emerging from the women's movement. And it is no accident that they were enacted just as the feminist tide in the United States began to swell.[41]

A major irony involved with the whole campaign is that the Mormon church taught these women the skills in public speaking, teaching, and organization they are now using to challenge the institution. As Johnson states: "Ironically I am what they made me . . . I am strong because the Church makes strong women. There is a song in the Church: 'Do What Is Right and Let the Consequences Follow.' I took them at their word."[42] These feminists argue that as strong women they are forcing the church back to its "original doctrine and tenets."[43] These women feel the men have sidetracked the institution from its orginal goals by getting too involved in politics and other issues not necessary for a religion and that they are forcing the church back to its essential teachings, especially on the subject of women in the church. One of the original tenets being sought is the ability to exercise free agency within the institution. To these women, free agency is "the right of each individual to act according to his or her conscience."[44] They see this very important Mormon belief as being worthless "if it only means freedom to agree with the brethren."[45]

In order to exercise their freedom of speech the Mormons for ERA use the popular press as well as a variety of nonverbal tactics such as passing out balloons at the 24th of July parade in Salt Lake City bearing the label "Mormons for ERA," chaining themselves to temple gates, candlelight vigils, and hiring airplanes with banners to fly over church meetings.[46] Recently they have begun symbolically to vote "No" to the decisions of church leaders at local and church wide meetings.[47]

Their major method, however, is to depend on the popular press to get their ideas before the public. The Mormons for ERA seem to have an extraordinary

faith in the press. Each of their newsletters, for example, contains numerous references to press coverage they have recently received. Perhaps this coverage is so important because they see it as the only possible way to get their ideas freely to the public and members of the Mormon church.

Mormon Response to Johnson

In their history of the Mormon church Leonard J. Arrington and David Bitton describe the status of women in that religion:

> For the most part, however, Mormon feminists have been a quiet minority, and the majority of Mormon women appear to be content with the traditional models as long as they are somewhat elastic. . . . there has been among Mormon women little evidence of a demand for greater equality; certainly there are no great pressures . . . for priesthood for women, despite similar demands in other contemporary faiths. Feminists on the more radical edge of the movement express dismay at what they see as complacency on the part of Mormon women.[48]

As the official historian of the Mormon church, Arrington probably is stating the beliefs of the male hierarchy in the book. The perceptions of the Mormon church leaders obviously are in opposition to the ideas of Johnson and her followers.

The Mormon church quickly responded to Johnson's charges. The arguments used by Mormons show that there is little agreement on issues between the two groups. The most basic disagreement concerns assumptions about the ERA. Johnson and her followers argued that its passage is critical for the advancement of women's rights but Mormon women believe it is unnecessary and will actually be detrimental to women. Eleanor Rigby Colton states her belief that "most of the important objectives of the women's movement can be and are being achieved through legislative and judicial processes--case by case--which is the safest and, in the long run, the best way of obtaining justice. We should accelerate enforcement of existing laws and press for enactment of state laws to remove continuing inequities."[49] Mormon women further believe that the ERA is not necessary because "women already have rights."[50] Obviously the combination of pushing for state laws and the belief that women already have rights would work against the acceptance of the ERA among Mormons and those who agree with them.

Mormons believe that women have been granted many rights that are not possessed by women in other groups. Church members state that the institution "is complex enough and populated with enough strong, achieving female personalities that they are able to continue pushing on the boundaries, trying different options, and resisting an excessively narrow conception of their role."[51] They believe that the ERA will disrupt their current position in society because "the uncertainties and potential dangers in the ERA outweigh the good it will achieve."[52]

Not only do these Mormon women believe they have more rights than other women but they are given more training and opportunities for leadership than other groups. Colton outlines this belief: "I know of no church that gives women the leadership responsibilities or opportunities to develop that the Mormon Church does. . . . Girls and young women are given leadership training and a position of leadership at an early age. My experience has been that this develops strong women."[53]

Because they are content in their church positions the Mormon women are willing to accept a more traditional concept of motherhood and a more traditional relationship with their husbands than many contemporary women. Arrington and Bitton outline the role of Mormon women: "Aware that there has always been a discrepancy between their own ideals and the 'ways of the world,' they tend to see their defense of the nobility of the wife-mother role as part of an overall stance of maintaining standards against the erosion of the modern age."[54]

The women seem afraid that the passage of the ERA will upset the positive relationship which exists between men and women in the Mormon church. Barbara Smith, the President of the Relief Society and the highest ranking woman member of the church, describes the male-female relationship: "We have a basic doctrine that puts men and women together in partnerships rather than power struggles."[55] Smith expresses her belief that passage of the ERA will force women to compete with men for power. Smith elaborates: "There is always going to be this contending with one another. What we want to do is help our women understand that they have something more significant to offer the world--the influence of a good woman in a home as she teaches and trains children. Right now it seems to me that we are placing very little value on the home."[56]

The importance of the home and the relationship to their husbands is a vital part of the Mormon woman's life. They argue that there "are no more liberated women in the world than Mormon women because they understand who they are. . . . They understand they have the great opportunity of being partners with their husbands forever."[57] This focus on family is one of the central themes of the church: "the family is the fundamental unit in God's plan, that exaltation is obtained through the love that results from the eternal companionship of man and woman."[58] The women argue that a person who is unhappy in her relationship with males can make changes in those relationships: "If we don't like the way men are treating us, then rear them in another way. . . . Bring up those little boys another way. Whisper in your husband's ear another kind of thought."[59]

The Mormon women further express their belief that there are differences between men and women: "They differ physically, in life patterns, and in division of domestic responsibilities. We should have the flexibility to enact laws that recognize 'rational differences.'"[60] Such statements reflect a belief that the ERA would eliminate such differences, leading to the breakdown of the family and destroy the home. Barbara Smith further states that the ERA would break down the family because it will "promote a unisex society and encourage homosexual and lesbian activities."[61]

Generally then a picture emerges of Mormon women who seem content with their role in the church and family. Once the women outline their contentment with their lives, they attack Johnson because she has discriminated against them. They state that Johnson and her followers "have made it virtually impossible for women who do not agree with their position to obtain meaningful government positions, thereby stifling dissent in an attempt to impose what they claim to be good for all."[62]

The anger of these women shows when they condemn Johnson for "riding the tide of a favored political position" and using that position to glorify herself and present "a distorted image of church leadership."[63] They state that Johnson is "presenting women who disagree with her as mindless sheep."[64] Ultimately their anger is reflected in the belief that Johnson deserved to be excommunicated. Elaine Cannon outlines this position: "It seems very clear to me that the Rotary Club wouldn't put up with a member who went around and said the Rotary is crazy. I think the criticism that was leveled at the institution and people we hold sacred were in poor taste."[65]

The Mormons further argue that Johnson was excommunicated for moral reasons, not political ones as Johnson claims. Furthermore, Mormons express their belief that they do have a right to function in the political arena even though Johnson claims they should not be involved in such activities. Mormons who are working against the ERA are described as "members who feel strongly that the amendment isn't a good thing . . . we are acting on our own, but we're doing it because of the counsel of our church elders."[66]

Even a brief description of the reaction to Ms. Johnson by Mormon women shows that they strongly disagree with her ideas. Johnson would retaliate by stating that the Mormon women are simply saying what they are told to say by male church leaders. It seems obvious that in an institution like the Mormon church that two such diametrically opposed positions would not be able to exist

at the same time. It is not surprising that the resulting clash did occur and that Johnson was eliminated from the church.

Conclusion

In his book The System of Freedom of Expression, Thomas I. Emerson states that "Early struggles for freedom of the mind centered around religious freedom, and legal protection for freedom of belief has developed most explicitly and most extensively in these areas. Thus freedom of religion is the subject of special guarantees in the First Amendment: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .'"[67] Emerson elaborates: "As a general proposition the Supreme Court has interpreted the First Amendment to afford complete protection to religious belief. There is no doubt that the Mormon church did prevent Johnson from speaking within the institution but such denial does not come under the control of the courts. The Mormon church is not a part of the federal government or any of its entities nor does the Mormon church receive tangible benefits from the federal government thus it is not subject to federal law in this case.[69]

The church further has the power to excommunicate Johnson because the authority in the institution rests with the church leaders rather than the government. This power was given to the leaders because of the establishment clause of the First Amendment. The state has no power in this case because it is clearly a church matter. Similar actions against Johnson by a secular group might have caused the government to move against the organization but because the Mormon church does not get benefits from the federal government, it falls outside the court's jurisdiction.

Emerson argues that the court may place limitations on religious action. Such intervention may occur when there is a need to protect the life and safety of citizens. A prime example of such intervention were the rulings on polygamy and the Mormon church. The Supreme Court ruled that public morality was being undermined when women and children were subjected to the effects of polygamy, thus the state had a mandate to act. In one of those rulings, Davis v. Beason, the court ruled that the First Amendment "was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of any sect."[70]

In placing restrictions on such actions the court must be positive that a clear state purpose is served and it must not violate the establishment clause. If the court oversteps its bounds its actions may serve to effectively disestablish a religion. Such action would violate the establishment clause of the First Amendment.

A reading of the literature on the First Amendment makes it clear that the Mormon church clearly had a right to excommunicate Johnson. Nor can it be denied that it has the right to excommunicate other feminists who challenge the hierarchy the way Johnson did. Marilyn Warenski comments on that right: "She gave them plenty of grounds by the standards of a male-dominated authoritarian church which provides no avenue for dissent. . . . It is not surprising to me that she was excommunicated. It is surprising that she ever rose up in the first place."[71]

Their excommunication was probably an error, however, because it forced Ms. Johnson and many of her followers to decide between being a Mormon and a feminist. The church leaders probably thought she would choose to remain a Mormon--Johnson chose to be a feminist. That decision forced her into a situation where her only route was through the popular press and the press was more than happy to accommodate. If she had followed the dictates of Mormon leaders, Johnson would have attended church and attempted to work herself into

position where she would be reinstated as a member of the group. In order to achieve that goal, Johnson would have had to quit her fight for the ERA and remained silent on the issue. Johnson saw such a position as a violation of her freedom of speech so she chose to go outside the church, taking her message to the people. This decision made it impossible ever to return to the Mormon church.

In dealing with the excommunication of Sonia Johnson as a violation of her freedom of speech, it must be noted that much of Johnson's loss of freedom may not be apparent but implied. John[illegible] felt she would lose her rights by staying in the church. If she left th[illegible]tution she retained her freedom of speech but lost her religious roots. [illegible] believes that the church was coercing her to be quiet because of the power of that institution in her life. She argues that she lost her right to speak in a religious setting because of her actions in secular politics. She then tries to make the case that her political life ought not be used to punish her in a religious group. The church disagreed and severed her from the community. Johnson not only argues that her excommunication was a mistake but that it would not solve what the Mormon leaders hoped to accomplish:

> "I also made an effort throughout to help them realize that their problem . . . was not one little Virginia housewife. That getting rid of me would not solve anything. That I was a symptom of a very deep, very ancient, and increasingly painful disease in society and religion, and that unless they became aware of it and dealt with it in some sensitive, realistic ways, the problem of women in the church was going to intensify until it made the issue of black men's holding the priesthood look like a tea party. I tried to give them warning. But since none of them anywhere along the hierarchical line knew anything about the women's movement, except the stereotypes pumped out by the right wing, they did not understand what I was saying."[72]

Ultimately, in Johnson's view it boiled down to the decision between being a Mormon with no right to speak and being a non-Mormon with the right to speak. She chose the latter.

Johnson's choice to be a feminist may be seen as an example of an increasingly important issue in the Mormon church (and other traditional religions) where the role of feminist in the secular world becomes more important than being a member of a religious group that denies her rights as a woman. If this view becomes more popular churches will be faced with serious dilemmas. They will have to be careful with the use of sanctions like excommunication because the dissident may receive such publicity that the institution loses credibility in the public's eyes. In the Mormon church, for example, the negative publicity over Johnson's excommunication has probably limited its ability to move against other individuals like Johnson. Johnson's excommunication has probably made it possible for other Mormon women to speak out with less fear of sanctions from the church.

The whole concept of power of heirarchies in churches may be undermined if women prefer to be feminists rather than church members. In the past excommunication and its threatened use has been a deterrent to dissent. If women are not concerned with that power the men lose much control within the organization. Thus men may actually lose power after exercising the legitimate control given to them by the institution.

Instead of being aware of changes concerning women's rights in the United States Mormons seem to be retrenching. As Arrington and Bitton state: "As the American women's movement gained momentum in the early 1970s the commitment to priesthood and motherhood seemed a dissonant counterpart. Church leaders saw publicized demands for women's rights and freedoms as yet another attack on the family."[73] The church throughout "the 1950's and 1960's" placed much emphasis on "the traditional home theme . . . usually directed at women."[74]

This emphasis is what the Mormons for ERA attacked.

The Mormons for ERA are challenging the direction of the Mormon church on the issue of women's rights. They argue that the male hierarchy is increasingly attempting to consolidate and increase its power over women. The battle over the hierarchy's actions is being fought in the press, and increasingly, in the church itself. The Mormon church is faced with a long and difficult battle with its women members. How the church deals with women's issues will have a great effect on it in the future. The issue of freedom of speech will be a major one in that battle--both in the Mormon church and other traditional religions in the United States.

Endnotes

[1]Many professionals, like pastors, doctors, lawyers, and journalists, take oaths regarding confidentiality. Oftentimes, a person signs away certain rights via their membership and loyalty to professions and institutions. College teachers, for example, do not have the right to evangelize their students toward a religious persuasion or a political candidate.

[2]Several articles in the religious press discuss the relationship between churches and the ERA including: Ronald Goetz, "Justifiable Exceptions to Religious Freedom," Christian Century, 97, 16 January 1980, pp. 38-39; Dorothy Lara-Brand, "ERA: Before and After," Engage/Social Action, 4 (December 1976), pp. 15-16 and 49-50; M. McAuliffe and C. Rae, "ERA: Pro and Con: An Interview," Our Sunday Visitor Magazine, 69, 15 June 1980, pp. 6-7; and "ERA Ratification by 1979?" Engage/Social Action, 5 (June 1977), pp. 2-3.

[3]Various discussions of the role of women in the church and family are found in the following: Wayne H. House, "Paul, Women, and Contemporary Evangelism," Biblioteca Sacra., 136 (January-March 1979), 40-53; Duane A. Litfin, "Evangelical Feminism: Why Traditionalists Reject It?" Biblioteca Sacra., 136 (July-September 1979), pp. 258-271; Duke K. McCall, ed., "The Church and the Family," Review and Expositor, 75 (Fall 1978), 3-174; James M. Wall, "The Gospel According to Schlafley," Christian Century, 96 (April 1979), pp. 395-396; and Jim Stentzel, "Called on the Evangelical Carpet: Moody Bible Institute Flexes Its Male Muscles," Sojourners, 8 (October 1979), p. 9.

[4]The Mormons for ERA was founded after Johnson testified for the extension of the Equal Rights Subcommittee in 1978. At those hearings Johnson clashed with Senator Orrin Hatch of Utah. The clash received a great deal of publicity in the national press. Johnson openly spoke out in favor of the ERA even though her local church leaders warned her not to. In December of 1979 she was excommunicated.

[5]Ellen Goodman, "Mormons Message as Old as Inquisition," A.P. release distributed by Mormons for ERA, n.d., n.p.

[6]Christine Rigby Arrington, "One Woman Against the Patriarchal Church," Savvy (October 1980), p. 30.

[7]Arrington, p. 29.

[8]Jane Cartwright, "Mormon women come out of the closet," Seattle Times, 4 Nov. 1980, n.p. Distributed by Mormons for ERA.

[9]Peter Gillins, "ERA vs. Mormon Patriarchy: Controversy Grows Painful," Albuquerque Journal, 3 Feb. 1980, p. E-1, Col. 3.

[10]Gillins, P. E-1.

[11]Personal interview with Sonia Johnson, Albuquerque, New Mexico, 20 July 1981.

[12]Marty LaBrosse, Mormons for ERA Literature, 1 Dec. 1979. Copy in possession of the author.

[13]Sonia Johnson, From Housewife to Heretic. (Garden City, N.Y.: Doubleday and Co., 1981), p. 153.

[14]Prime Time Sunday, NBC Television, 2 Dec. 1979.

[15]Lisa Cronin Wohl, "People: A Feminist Latter-day Saint," Ms., (March 1980), p. 39.

[16]Carolyn Mitchell, "for the has-beens," Mormons for ERA Newsletter (August 1980), p. 2.

[17]Sonia Johnson, "Patriarchal Politics: Sexual Politics in the Mormon Church," American Psychological Association, 1 Sept. 1979. This speech was widely distributed among Mormons. The statements Johnson made in the speech were used against her in her excommunication trial.

[18]"Mormon Feminist Awaits Verdict, Possible Excommunication," Albuquerque Journal, 3 Dec. 1979, p. A-6, col. 2

[19]Janice Peck, "Carrying on the Battle of Sonia Johnson," Seattle Sun, 12 Dec. 1979, p. 7. Distributed by Mormons for ERA.

[20]Teddie Wood, "The Pitfalls of Excommunicating a Mormon for ERA," Mormons for ERA Newsletter, (February 1980), p. 1. In their book, The Mormon Experience (New York: Vintage, 1979), p. 377, Leonard J. Arrington and David Bitton describe the grounds for excommunication: "Excommunication from the church is a serious matter among Mormons and is essentially a function of local leaders. The principal considerations are whether the person has apostatized--by vociferous opposition or simple withdrawal--or whether he has committed some grievous sin, such as adultery; in the latter case, excommunication is carried out as the first step on the path of forgiveness, rehabilitation, and restoration of full membership. . . . Excommunications are rare." They then describe the procedures for excommunication.

[21]Merry A. Demerest, "ERA 'Testimonies,'" Mormons for ERA Newsletter, (October, 1980) p. 5.

[22]Johnson, "Patriarchal Politics," p. 1.

[23]Michael J. Barrett, "Letters to the Editor," Mormons for ERA Newsletter (August 1981), p. 3.

[24]Hazel Rigby, "The Mormons Have Crossed the Great Divide!" Mormons for ERA Newsletter (August 1981), p. 3.

[25]Wood, p. 1.

[26]According to Arrington and Bitton (pp. 376-377) the president of the Mormon church is the only one authorized to receive revelation and prescribe doctrine for the whole church. There has been no revelation concerning women's rights so the Mormons for ERA say the church's position is based only on the opinions of male leaders, not the word of God.

[27]Wohl, p. 42

[28]Even before she was officially excommunicated Johnson was silenced. Between the time she was tried by a Bishop's court and her excommunication, Johnson attempted to speak in a Fast and Testimony meeting. The leaders of her local ward ended the meeting early rather than allow Johnson one last chance to speak. The event was a moving one in Johnson's life. She describes it in From Housewife to Heretic, p. 305.

[29]Johnson, From Housewife to Heretic, p. 298.

[30]Johnson, From Housewife to Heretic, p. 296.

[31]Johnson, From Housewife to Heretic, p. 135.

[32]John Burleson, "Letters to the Editor," Mormons for ERA Newsletter (January 1981), p. 7.

[33]Personal interview with Sonia Johnson.

[34]Elaine Entrekin, "Letters to the Editor," Mormons for ERA Newsletter (August 1981), p. 7.

[35]"You Can Demonstrate Alone!" Mormons for ERA Newsletter (August 1981), p. 1.

[36]Marty LaBrosse, "Mormon Women: Another Voice," p. 8. Distributed by Mormons for ERA.

[37]"From the Editor," Mormons for ERA Newsletter (August 1980), p. 7.

[38]Quoted in Barbara Pierce, "Kingston Woman, State Mormon Coordinator, Fears Excommunication," Bremerton Sun, 8 Dec. 1979, p. 6. Distributed by Mormons for ERA.

[39]Marty LaBrosse, Mormons for ERA literature, April 21, 1982, p. 2. Distributed by Mormons for ERA.

[40]LaBrosse, April 21, 1981.

[41]Johnson, "Patriarchal Panic," p. 3.

[42]Goodman, Mormons for ERA literature

[43]Peck, p. 7.

[44]Wohl, p. 7.

[45]Peck, p. 7.

[46]The banners pulled behind airplanes have statements like "Mother in Heaven Loves Mormons for ERA."

[47]Each year leaders of the Mormon church are sustained by members of the church. Arrington and Bitton describe the process on pp. 236-237. The Mormons for ERA vote no to show that they do not accept the church leaders as their political leaders.

[48]Arrington and Bitton, p. 239.

[49]Quoted in Virginia Robicheaux, "D.C. Relief Society Leader Defends Sonia Excommunication," Salt Lake Tribune, 2 Jan. 1980, p. 8-C, Cols. 6-7.

[50]"ERA-Backing Woman Asks Mormon Excommunication," Albuquerque Journal, 19 Dec. 1979, p. E-8, Col. 3.

[51]Arrington and Bitton, p. 240.

[52]Robicheaux, p. 8-C.

[53]Robicheaux, p. 8-C.

[54]Arrington and Bitton, p. 240.

[55]Quoted in Peter Gillins, "Mormon, Feminist Debate Hot Issue," Albuquerque Journal, 3 Feb. 1980, p. B-6, Col. 1.

[56]Gillins, p. B-6.

[57]Gillins, p. B-6.

[58]Robicheaux, p. 8-C.

[59]Gillins, p. B-8.

[60]Robicheaux, p. 8-C.

[61]Gillins, p. B-6.

[62]Robicheaux, p. 8-C.

[63]Robicheaux, p. 8-C.

[64]Robicheaux, p. 8-C.

[65]Gillins, p. B-6.

[66]Quoted in Peck, p. 7.

[67]Thomas I. Emerson, The System of Freedom of Expression (New York: Random House, 1970), p. 23. For further discussion on religion see: Nat Hentoff, The First Freedom (New York: Dell Publishing, 1980), pp. 151-196 and Walter Berns, The First Amendment and the Future of American Democracy (New York: Basic Books, 1976), pp. 33-75.

[68]Emerson, p. 23.

[69]Much of the information was taken from Sam Soleyn, an attorney and Church of Christ minister, in a personal interview in Albuquerque, New Mexico on September 21, 1982.

[70]Quoted in Emerson, p. 23.

[71]Peter Gillins, "Mormon, Feminist Debate Hot Issue," Albuquerque Journal, 3 Feb. 1980, p. B-6, Col. 1. Warenski wrote a book that was highly critical of Mormons.

[72]Johnson, From Housewife to Heretic, p. 299.

[73]Arrington and Bitton, pp. 236-237.

[74]Arrington and Bitton, pp. 234-235.

THE SUPREME COURT AND THE FIRST AMENDMENT: 1981-1982

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I. The Nuances of Non-action

Occasionally, it can be argued, the Supreme Court exerts greater influence by declining to act than by hearing arguments, deliberating issues, and handing down an opinion. Such may have been the case when the Court dismissed the appeal (50 LW 4159) in Princeton University and New Jersey v. Chris Schmid (427 A.2d 615, 1980).

Chris Schmid, a member of the U.S. Labor Party, while distributing political literature on the Princeton University campus was arrested and charged with trespass upon private property. The materials distributed dealt with the City of Newark mayoral campaign and with the U.S. Labor Party. Schmid was not a Princeton student, and the U.S. Labor Party was not a recognized campus organization. Although neither had not sought permission to distribute and sell political materials, Princeton regulations required permission for on-campus distribution by off-campus organizations. Schmid previously was told that without permission to solicit he would be arrested for trespass if, unsponsored, he returned to the campus as an uninvited person soliciting support.

Schmid was convicted of trespass in municipal court, and a new trial in Superior Court ended with the same result.

In his appeal to the New Jersey Supreme Court, Schmid claimed that his trespass conviction violated both the federal and state guarantees of free speech and assembly because the university was constitutionally obligated to permit his on-campus activity. The state responded that Schmid encroached unlawfully upon protected private property and had not undertaken state action or made the public use of property which would compel speech and assembly guarantees.

The central issue which evolved for the New Jersey high court's resolution was whether a private university's regulations, without reasonable standards to protect both the legitimate interests of the university and individual expression, can prohibit the noninjurious exercise of individual expression without obstructing constitutional rights.

Despite exceptional cases which distinguish precedent from "stand-alone" facts, the U.S. Supreme Court has not applied the First Amendment to incidents which occur on private property used nondiscriminatorily for "private purposes," even though speech and assembly may be infringed. The New Jersey Supreme Court, which found for Schmid, had to examine the nature, purpose, and use of the Princeton campus as related to the institution's announced mission in order to distinguish this case from the evolving law as applied to "truly" private property.

Therefore two questions pertained: (1) What kind of involvement with the state will trigger application of the First Amendment when otherwise private property takes on a public nature? (2) When does otherwise private property become sufficiently devoted to public use that the owners of private property must permit a reasonable exercise of expressive freedoms? The New Jersey Supreme Court addressed both of these questions.

If private institutions share features of state government then freedom of expression enjoys constitutional protection. There must, however, be an interdependent or symbiotic relationship between the private entity, in this case Princeton University, and the state government. But the mere fact that the

private entity is subject to extensive state regulation does not per se convert private into state action. There must be a "sufficiently close nexus" between the state regulation and the allegedly unconstitutional actions of the private entity. The court noted that a university could be found interdependent with the state if the institution:

1. received government funds
2. performed a governmental function by providing education
3. was accredited or state chartered
4. derived economic benefit from tax exemption
5. provided indirect enforcement of government laws
6. was built on formerly public lands

In fact Princeton was shown to have a continuous relationship with the state, to be accredited, to be advantaged by state programs which provide authority to issue bonds for construction and loans to students, to have tax-exempt property and buildings, to receive state-budgeted funds, and to employ campus police authorized to make arrests under state law.

After comparing a private institution's possible involvement in state action with Princeton's relationship to the state, the New Jersey Supreme Court concluded that the interface between Princeton and the state was not an interdependent symbiotic relationship and, in particular, even Princeton's use of the state's trespass laws to protect its property did not constitute state action.

Even if involvement in state action did not require honoring the First Amendment, the court stressed that property devoted to public use may. But private property does not lose its private character merely because the public is invited to use it for designated purposes. The constitutional balance between expression and property rights is measured by the nature and extent of the public's use of such property, and the more devotion to public use the more the private property must accomodate the public use of that property. The limits of speech and assembly on private property are established by:

1. the normal use of the private property
2. the extent and nature of the public's invitation to use the property
3. the purpose of the expressional activity on such property in relation to the private and public use of the property

These measurements when applied to Schmid's trespass conviction resulted in a finding that Princeton's use of its property was made in accord with its announced educational goals which include free speech and peaceable assembly as basic requirements for free inquiry and the search for knowledge. The "public presence" on the campus is in accord with the institution's educational mission and though the institution is private it encourages "a wide and continuous exchange of opinions and ideas to foster a policy of openness and freedom with respect to the use of its facilities." The court concluded that "the commitment of its property, facilities, and resources to educational purposes contemplates substantial public involvement and participation in the academic life of the University."

Therefore, the Supreme Court of New Jersey, having found that Princeton made its campus available for an open exchange of ideas by the campus community as well as the public generally, that Princeton acknowledged idea exchange to be the core of its intellectual life, and that such a commitment holds out its property for public use concluded that Schmid's political expression, consistent with Princeton's goals, is a free speech right guaranteed by the New Jersey Constitution. Protection of free speech by the state, therefore, does not interfere with Princeton's independence but instead protects Princeton's fundamental philosophy of open debate.

It should be noted that both the U.S. Supreme Court and the New Jersey Supreme Court avoided applying the First Amendment to Princeton. The New Jersey

court stressed that Schmid's reliance on the state constitution provided better grounds for relief and such reliance on numerous occasions (right to privacy, right to an education, right to vote, freedom from search and seizure, freedom of the press) has been acknowledged by the U.S. Supreme Court to provide guarantees which surpass those of the federal constitution. To reinforce this the state court cited prior findings which included provisions that "no law shall be passed to restrain or abridge the liberty of search or of the press" and "the people have the right freely to assemble together to consult for the common good, to make their own opinions."

Thus, Schmid suffered an impairment of his state constitutional rights of speech and assembly and his conviction for trespass was overturned. But while Princeton was held to have extended a broad invitation to the public, it was not open ended for any and all purposes. Princeton's regulations for requiring permission to communicate on campus were found devoid of reasonable standards designed to protect both the legitimate interests of the University and individual expressional freedom. Although the owner of private property may fashion rules to control activities, Princeton had not done this. Their failure to provide alternative means to engage in substantially the same expressional activity increased their burden to accomodate Schmid.

While the Schmid Case was on appeal to the New Jersey Court, Princeton University substantially amended its nonspecific regulations by spelling out standards for granting or withholding permission for self expression and for dealing with the time-place-manner conditions for individuals to exercise their rights of speech and assembly. The United States Supreme Court (50 LW 4160) noted that after the new standards were adopted the case lost its character. The Court consequently lost interest in examining the validity of an old regulation; and when Princeton declined to join the State of New Jersey in the appeal, the Supreme Court dismissed the appeal rather than issue an advisory opinion on an abstract question of law.

II. In Brief

The Court released 144 case opinions during the 1981-1982 term. The winners were the mentally retarded, illegal alien children, Richard Nixon, and opponents of child pornography. The losers were those liberals who had hoped Sandra Day O'Connor would delay the display of her solid conservative credentials and that Lewis Powell would side more frequently with Marshall and Brennan than with conservatives Burger and Rehnquist.

Although the 1981-1982 session will never be remembered because the First Amendment dominated the attention of the Court, the closing days of the session witnessed three diverse but highly significant decisions which (1) created a new category of unprotected expression (New York v. Ferber); (2) prohibited punishment for economic boycotts as a type of protected expression (NAACP v. Clairborne Hardware); and (3) limited the absolute discretion of local school boards to remove books from school libraries (Board of Education v. Pico).

In other First Amendment related decisions the Court without as much public notice (1) upheld an ordinance banning commercial activity which promotes illegal drug use since it does not restrict speech as such but regulates the commercial marketing of items through labels that serve an illicit purpose (Hoffman Estates v. Flipside, Hoffman Estates Inc.); (2) found that a state law which prohibits candidates from offering material benefits to voters conflicts with the First Amendment if it prohibits a political candidate from pledging to reduce his salary if elected (Brown v. Hartlage); (3) supported state regulation of commercial speech if such is not more extensive than reasonably necessary to further substantial interests (In Re R.M.J.); (4) declared a state statute in violation of the First Amendment because it required closure of sexual assault trials during the testimony of a minor victim (Globe v. Superior Court).

III. Opinions Rendered

New York v. Ferber (50 LW 5077)*

By statute the State of New York prohibits "knowingly promoting a sexual performance by a child under the age of 16 by distributing material which depicts such a performance." Ferber, a bookstore proprietor specializing in sexually oriented products was convicted under the statute for selling films depicting young boys masturbating. An appeals court reversed the conviction by finding the statute underinclusive and overbroad. They so held because a companion statute which contained an obscenity standard banned similarly defined materials and thus the statute under which Ferber's conviction was obtained must be construed, in the absence of an obscenity standard, to prohibit the promotion of materials entitled to First Amendment protection.

The Supreme Court unanimously concurred in the judgment that the statute as applied to Ferber did not violate the First Amendment for several reasons spelled out by Justice White who delivered the opinion.

White supported the legislative judgment of New York "that the use of children as subjects of pornographic materials is harmful to the physiological, emotional and mental health of the child." "That judgment," White contended, "easily passes muster under the First Amendment."

The Court then set aside the Miller v. California, 413 U.S. 15 (1973) standards for determining the legally obscene by concluding that the Miller standards are not a satisfactory solution to the child pornography problem. Whether a work taken as a whole appeals to the prurient interest of the average person "bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work." The Court added: "It is irrelevant to the child (who has been abused) whether or not the material . . has a literary, artistic, political, or social value."

A third justification for regulating the pornographic depiction of children was cited as the economic motive realized by the illegal activity of advertising and selling pornographic works. The constitutional immunity for free expression does not release one from the violation of valid criminal statutes, statutes which if they included outlawing the employment of children in these films would have no greater First Amendment protections than those denied to film distribution.

The Court further took note of whether live performances and photographic reproductions of children engaged in lewd and sexual conduct could be an important and necessary part of a literary performance or scientific or educational work. They found this value to be "exceedingly modest" and supported the trial court's observation that, if necessary for literary or artistic value, a young looking person over the statutory age could be utilized.

Finally, Justice White reasoned that classifying child pornography outside First Amendment protection is compatible with earlier decisions which examine the content of speech (such as with libelous publications or fighting words) rather than exclusively the expressive interests. The Court concluded: "It is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required. When a definable class of material . . . bears so heavily and pervasively on the welfare of children engaged in its production . . . it is permissible to consider these materials as without protection of the First Amendment."

*Official U.S. case citations for the 1981-1982 Supreme Court term do not appear because they are assigned subsequent to the preparation of this article.

Justice Brennan joined by Thurgood Marshall concurred in the opinion of the Court with the proviso that his view is unchanged that "in the absence of exposure, or particular harm to juveniles or consenting adults, the State lacks power to suppress sexually oriented materials."

NAACP v. Clairborne Co. (50 LW 5122)

In Claiborne County, Mississippi, in 1966 a local branch of the NAACP undertook a boycott of white merchants to secure from civic and business leaders assurance that demands for equality and racial justice would be met. The boycott was supported by speeches encouraging support for the common cause, nonviolent picketing, and some acts and threats of violence. Several years later white merchants filed suit for lost earnings against the NAACP and other boycott participants including Charles Evers, NAACP field secretary and principal organizer of the boycott. The Mississippi courts found the boycott illegal and damages due the merchants for their losses resulting from the boycott participant's agreement to "use force, violence, and threats to effectuate the boycott."

In a unanimous opinion of these justices participaing (Marshall abstained) the Supreme Court held that the nonviolent aspects of the NAACP boycott were entitled to First Amendment protection. Justice Stevens, who delivered the opinion of the Court, contended that the NAACP, the petitioner on appeal, exercised protected First Amendment rights of speech, assembly, association, and petition rather than riot and revolution, to bring about political, social, and economic change. The state, empowered to regulate economic activity, has no comparable right, Stevens said, to prohibit peaceful political activity as represented by the petitioner's behavior. The state may grant compensation for the consequences of violent conduct but not for that which results from nonviolent, protected activity. Furthermore, according to the Court, liability does not attach for individual association with a group in which some members were violent unless the group possessed unlawful goals and the individual had specific intent to further the illegal aims. Attendance at NAACP meetings and intimidation of store patrons by "boycott enforcers" is insufficient to impose liability.

For similar reasons Charles Evers, whose speeches did not incite violence or authorize its use, could not be found liable for making protected utterances; and, the Court stressed, if his acts were insufficient to impose liability on him, they cannot implicate the NAACP, his principal, without interfering with the right to political association.

Since the boycott clearly involved constitutionally protected activity, the merchants could not recover their economic losses without violating the freedom of expression which lacked approximate violent and hence unlawful consequence.

Board of Education v. Pico (50 LW 483)

When a Board of Education ordered removal from school libraries certain books which they characterized as "anti-American, anti-Christian, anti-semitic, and just plain filthy," students brought action alleging violation of their First Amendment rights. The District Court granted summary judgment for the Board and the Court of Appeals reversed and remanded the case for trial to test whether the decision to remove the books rested upon disagreement with constitutionally protected ideas.

Despite the clear cut constitutional issue of school board censorship, each judge on the Court of Appeals panel filed a separate opinion. Similarly the Supreme Court was not of one mind. Justice Brennan announced the Court's judgment and was joined in an opinion by Justices Marshall and Stevens. Blackmun filed an opinion concurring with the judgment but only in part with the opinion. Justice White filed an opinion concurring in the judgment. Chief Justice Burger filed a dissenting opinion in which Powell, Rehnquist, and O'Connor joined. Powell filed a separate dissent. Rehnquist filed yet another dissenting opinion in which Burger and Powell joined. Justice O'Connor provided the final dissent by supporting the school board's prerogative to determine the educational suitability of books.

Justice Brennan's prevailing opinion cited limitations imposed by the First

Amendment on a board which removes books from school libraries. He recalled the Tinker v. Des Moines School District, 393 U.S. 503,506, position that students do not "shed their rights to freedom of speech or expression at the schoolhouse gate," and noted the special characteristics of a school library which make the recognition of student rights even more imperative. Brennan held that the Board's reliance on absolute discretion in curriculum matters in order to inculcate community values is a misplaced duty when it goes beyond the compulsory environment of the classroom into the school library, a sanctuary for voluntary inquiry. Nevertheless, the Board has significant discretion to determine library contents, but this may not be exercised in a partisan manner by removing books simply because they dislike the ideas in them. Brennan concluded that whether the Board exceeded its constitutional authority in exercising its discretion to remove library books is a "genuine issue of material fact" yet to be resolved.

Justice White concurred that the case should be remanded for trial on the factual issues and concluded necessity did not require the Court to presently determine the extent to which the First Amendment limits the Board's discretion to remove libary books.

Justice Burger's dissent supported by Powell, Rehnquist, and O'Connor rejected the notion that a school board had to justify to its teenage pupils a decision to remove a particular book. The dissent reserved for parents, teachers, and school boards, not judges, the determination of how standards of "morality and vulgarity" are to be treated.

Brown v. Hartlage (50 LW 4359)

Brown challenged Hartlage, the incumbent, in a general election to become a Commissioner of Jefferson County, Kentucky. Brown campaigned to lower Commissioners' salaries if elected. Upon learning that Kentucky law prohibits a candidate from offering voters material benefits in consideration for their votes, Brown retracted his pledge. After Brown won the election Hartlage sued in a Kentucky court alleging that Brown violated the Kentucky Corrupt Practices Act and asked that the election be declared void. Although the trial, relying on case precedent, found that Brown had violated Kentucky law by promising to reduce his salary to less than that fixed by law, the trial court determined that Brown was fairly elected and declined to order a new election. The Kentucky Court of Appeals reversed the trial court finding error in failure to order a new election. The appellate court held the retraction of the promise to be of no consequence and the trial court "mistaken in believing that it possessed discretionary authority to balance the gravity of the violation against the disenfranchisement of the electorate that would result from declaring the election void."

The question which the U.S. Supreme Court agreed to answer was whether a state is barred by the First Amendment from declaring an election void when the successful candidate announced to voters during the campaign that he intended to serve at a salary less than that fixed by law.

Justice Brennan on behalf of an unanimous Court acknowledged the legitimate interest of the state in preserving the integrity of its electoral process but not by restricting speech. Brennan held: "When a State seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment surely requires that the restriction be demonstrably supported not only by a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression."

This application of the Corrupt Practices Act could not be justified as a protection against vote buying. Brown spoke openly and subject to scrutiny by his opponent and the voters. This was not the kind of corrupting private agreement such as promising payment for support which is historically unprotected expression. In fact this was a promise to confer benefit on the taxpayer.

Brennan further stressed that the state does not incur justification for limiting speech out of fear that voters may make an improper choice. "It is not the government's function to select which issues are worth discussing in the course of a political campaign." Even statements such as Brown's which cannot be lawfully implemented (his salary would be fixed by law) must be protected or robust political debate will suffer. Because it was violative of First Amendment rights to nullify Brown's election victory, the Kentucky Court of Appeals was reversed. Brown uttered expression in good faith, without knowledge of its falsity, and outside the purpose for which the Corrupt Practices Act was created.

Village of Hoffman Estates v. Flipside, Hoffman Estates Inc. (50 LW 4267)

A village ordinance required a business to be licensed if it sells items "designed or marketed for use with illegal cannabis or drugs." Flipside marketed various items in its Village store including "roach clips" and pipes designed to smoke marihuana. Flipside upon being notified that it was in possible violation of the ordinance and without applying for a license filed a suit in Federal District Court alleging the ordinance to be unconstitutionally vague and overbroad. Flipside claimed the Village imposed prior restraint on speech because the ordinance treats the proximity of drug-related literature as a sign that paraphernalia are "marketed for use with illegal cannabis or drugs." Flipside also argued that "because the presence of drug-related designs, logos, or slogans on paraphernalia may trigger enforcement, the ordinance infringes protected symbolic speech."

The District Court upheld the constitutionality of the ordinance but the Court of Appeals reversed by finding the ordinance unconstitutionally vague on its face, vague with respect to its application, and arbitrary and discriminatory toward those with alternative life styles.

Justice Marshall for a unanimous Court reversed the appellate court and supported the constitutionality of the Village ordinance. Marshall claimed the ordinance did not proscribe speech but merely regulated the marketing of items that the labels reveal may be used illicitly, thus not so overbroad that it affects noncommercial speech. Even to the extent that commercial speech is implicated by restriction on the manner of marketing does not, according to Marshall, limit the communication of information "except to the extent it is directed at commercial activity promoting or encouraging illegal drug use, an activity which, if deemed 'speech,' is speech proposing an illegal transaction and thus subject to government regulation or ban." Marshall found it irrelevant whether the overbreadth of the ordinance affected the commercial speech of others, "since the overbreadth doctrine does not apply to commercial speech."

The Court concluded that Flipside had ample notice that its activities required licensing and that the display of certain magazines and books dealing with illegal drugs in close proximity to pipes and colored rolling paper clearly violated the ordinance guidelines. The ordinance was found to be sufficiently clear and not rendered void for vagueness because of the danger of arbitrary enforcement against protected expression.

In re R.M.J. (50 LW 4185)

The appellant, a St. Louis attorney, was charged with violating Missouri Supreme Court rule 4 which regulates advertising by lawyers. He allegedly published advertisements which used language to describe areas of legal practices and which listed courts in which he was admitted to practice. Neither was permitted under rule 4. The appellant claimed the advertising restrictions were an unconstitutional violation of his First Amendment rights, but the Missouri Supreme Court upheld the constitutionality of rule 4 and reprimanded the defendant.

Justice Powell delivered the opinion of a unanimous Court which reversed the Missouri Supreme Court by finding rule 4 restrictions on the appellant's advertising to violate his First Amendment rights.

Powell summarized the law pertaining to advertising professional services:

1. The truthful advertising of lawful activity is protected.

2. States may restrict advertising when the content or method is misleading or experience demonstrates that such advertising is subject to abuse.

3. Although misleading advertising may be prohibited in its entirety, the states may not absolutely prohibit "potentially" misleading information.

4. The potential for deception in advertising professional services is strong, but restrictions on such "may be no broader than reasonably necessary to prevent the deception."

5. The state has authority to regulate with narrowly drawn restrictions even when advertising is not misleading, but "the interference with speech must be in proportion to serving a substantial state interest."

The state's restrictions on attorney advertising (specifying permissible labels for areas of practice, e.g. "real estate" instead of "property law;" forbidding mention of jurisdictions in which the advertiser can practice; and controlling who can receive business announcement mailings) were found not to affect information inherently or potentially misleading and promoted no substantial state interest. Certain restricted information, the publication of which constituted grounds for state action against the appellant, was found by the Court to be not only factually presented but highly relevant. While other published information was found factual but uninformative (e.g. license to practice before the U.S. Supreme Court), it was not misleading and thus any limitation on such was too restrictive to justify exemption from First Amendment protection.

Globe Newspaper v. Superior Court (50 LW 4759)

The press and public were banned from the courtroom during the trial of a defendant charged with rape. The trial judge, citing a Massachusetts statute which provided for the exclusion of the press and public from sex-offense trials, closed the trial. Globe Newspapers challenged the trial court's closure order and the interpretation of the Massachusetts statute that "under all circumstances" the press and public are to be excluded during the testimony of a minor victim in a sex-offense trial.

The Supreme Court, after finding that the controversy was not moot despite the exclusion order expiring with the defendant's acquittal, found the Massachusetts statute, as construed, to be in violation of the First Amendment.

Justice Brennan reasoned for the Court majority that access to criminal trials is assured under the First Amendment so that the discussion of governmental affairs can be an informed one. Not only, according to Brennan, have criminal trials historically been open to the press and the public but such openness is essential to the functioning of the judicial process. But the right of access is not absolute in that the state may show that trial closure is necessitated by a compelling governmental interest.

However, Brennan contended that no such compelling interest was demonstrated in this case since there was insufficient justification for "mandatory" closure based on protecting minor victims of sex crimes from "trauma and embarrassment" or encouraging such victims to testify. A case-by-case examination of the minor victim's interests rather than a "mandatory" closing would, according to Brennan, better protect public access to trials limited only by restrictions to protect legitimate state interests.

The Court majority found neither logic nor common sense in support of the notion that an open trial would inhibit the truthful and credible testimony of a minor victim of a sex offense. Trial closure does not preclude access to the record of proceedings, court personnel, and other sources which supply accounts of such testimony the publication of which along with the victim's identity cannot be prevented.

As a result of the Court's decision in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) to support the constitutional right of public access to trials there was speculation that the Court for the first time had opened the door to acknowledging a constitutional right of access to information. Justice O'Connor, concurring in the Globe case, made a special effort to thwart granting assured access beyond criminal trials when she wrote: "I interpret neither Richmond Newspapers nor the Court's decision today to carry any implications outside the context of criminal trials."

Justices Burger and Rhenquist dissented by balancing the competing interests of the media for instant access against the state interest in protecting child rape victims from the trauma of public testimony. Their sympathies and arguments did not support the media's need to provide instant information. They found the presumption of openness for a criminal trial to be neither absolute nor irrebutable.

IV. Cases Disposed with Hearings

(The Supreme Court took action which in each of the following cases resulted in allowing the holding of the lower court to prevail except in those instances that are noted otherwise.)

ADVERTISING

Lower court: Prohibition by federal statute of the mailing of unsolicited commercial advertisements of contraceptives violates the First Amendment. Issue: Is the United States Code (39, 3001 (e) (2))prohibition against mailing unsolicited advertisements for contraceptives unconstitutional? Certiorari denied. Bolger v. Youngs Drug Products Corp., 50 LW 3745.

Lower court: The prohibition of advertising by an attorney who solicits the business of real estate brokers' clients does not violate the First Amendmendment. Issues: May an attorney be disciplined for mailing truthful and nonmisleading announcements of his availability to provide services? May The state take action against an attorney for violating a statute that bans all lawyer advertising that can be "constitutionally proscribed" and thus provide no notice of what lawyer conduct is prohibited? Certiorari denied. Green v. Grievance Committee for Ninth Judicial District, 50 LW 3636.

Issue: Is the First Amendment violated by a Nevada statute which prohibits advertising of brothels in counties where prostitution is illegal? Certiorari denied. Princess Sea Industries v. Nevada, 50 LW 3628.

Lower court: A Nebraska statute's prohibition of advertising that promotes sale of drug paraphernalia does not violate the First Amendment since the commercial speech regulated encourages commission of an illegal act. Issue: Does the statute's prohibition of advertising punish protected speech? Certiorari denied. Casbah v. Thone, 50 LW 3329.

ATTORNEYS

Issue: Does a rule which prohibits public comment by an attorney about a pending administrative proceeding with which he is associated when such comment is "reasonably likely to interfere with a fair hearing" violate the First Amendment by exceeding necessity and failing to specify prohibited comment? Certiorari denied. Cohen v. Disciplinary Board of Pennsylvania Supreme Court, 50 LW 3354.

COMMERCIAL SPEECH

Issue: Does a lower court interpretation of a mail fraud statute and its effect on the distribution of promotional material violate the First Amendment

protection now extended to commercial speech? Certiorari denied. Tage v. U.S., 50 LW 3700.

Lower court: Freedom of speech is violated by a municipal ordinance which bans posting of any signs, including political, on public property. Issue: Are First Amendment guarantees violated by a municipality which absolutely prohibits posting of political signs on public property? Certiorari denied. Sussli v. City of San Mateo, 50 LW 3404.

CONSTITUTIONAL LAW

Issue: Does the characterization of statements as political or commercial speech depend on their content, or as the lower court concluded, on the motivation of the speaker? Certiorari denied. Aetna Life and Casualty Co. v. Young, 50 LW 3380.

COURT PROCEDURES

Issue: Do state courts which fail to state the reasons why they deny a petitioner's claims, violate the petitioner's First Amendment rights when those claims pertain to the introduction and reliance on letters, petitions, and speeches? Certiorari denied. Switlik v. Hardwicke Co., Inc. 50 LW 3380.

EDUCATION

Lower court: A faculty member's attack before the board of regents about the administration of his university was not constitutionally protected speech. Meaningful discussion about matters of legitimate public interest was not fostered by the attack. Issues: Must speech content foster "rational discourse, exchange of ideas, and meaningful discussion" in order to be protected? Are faculty members subject to the same First Amendment standards applied to students in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)? Certiorari denied. Lux v. Angel, 50 LW 3115.

Lower court: The trial court properly found that a school teacher's First Amendment rights were violated. Issue: Is an untenured school teacher wrongly dismissed when grounds for dismissal result from her experience of First Amendment right to engage a principal, superintendent, and trustees in private conversations? Certiorari denied. Bullard Independent School District v. Brown, 640 F2d 651, 50 LW 3020.

ELECTIONS

Issue: Is it unconstitutional for a state law to require candidates for public office to file a report disclosing the identity of campaign contributors to and fund recipients from a minor political party which was subject to covert FBI surveillance and personal harassment and reprisal? Probable jurisdiction. Brown v. Socialist Workers '74 Campaign Committee, 50 LW 3492.

ENTERTAINMENT

Lower court: Although valid under the 21st Amendment, a New York statute that bans topless dancing where the sale of liquor is licensed violates free expression as protected by the state constitution. Issue: Can the federal guarantee of state power to regulate the sale of alcohol, which includes the power to prohibit such sale when accompanied by topless dancing, be circumvented by a state constitutional guarantee of free expression for topless dancers? Certiorari denied. New York State Liquor Authority v. Bellanca, 50 LW 3788.

GOVERNMENT

Lower court: The court affirmed prohibiting a motorcycle club from using property as a private club contrary to a county zoning ordinance. Issue:

Is the governmental interest in zoning such as to warrant abridging the right to peaceful assembly by prohibiting or restricting private clubs? Certiorari denied. Brown v. County Commissioners of Kent County, Md., 50 LW 3698.

Lower court: A federal employee's First Amendment rights are not violated by suspension or dismissal for distributing defamatory statements about a supervisor. Issues: Does federal law protect federal employees who distribute to co-workers testimony they have provided members of Congress? Does the First Amendment protect disseminated defamation when no harm results to the employing agency? Certiorari denied. Cook v. U.S., 50 LW 3169.

Lower court: A court decision was affirmed that the First Amendment is violated by replacing Democrats with Republicans in state jobs when the replacement decision is based in part on political affiliation. Issue: Does the dismissal of public employees "for valid governmental purposes violate the First Amendment because those employees were affiliated with one political party, particularly when the governor's reform plan called for their dismissal?" Certiorari denied. Thornburgh v. McMullan, 50 LW 3560.

MEDIA

Issue: Does a state court violate First and Fourteenth Amendment rights by banning the public and the press from civil trial proceedings without showing that a public trial would jeopardize the rights of parties involved in the case? Certiorari denied. Cox Enterprises, Inc. v. Vascocu, LW 3703.

OBSCENITY

Lower court: A Maryland statute which permits possession and distribution of obscene materials "by persons having bona fide scientific, educational, governmental, or other similar justification" does not conflict with the state's authority to proscribe obscenity. Issue: Does a law which authorizes the determination of obscenity become inoperable and unenforceable because another law recognizes that obscene material serves scientific, educational or governmental purposes? Certiorari denied. Baltimore Street, Inc. v. Maryland, 50 LW 3492.

Lower court: The court affirmed conviction of a nude dancer for violating a local obscenity ordinance. The ordinance which added obscene acts and simulations to those enumerated in Miller v. California, 413 U.S. 15 (1973) was found not to be overbroad, and expert testimony to verify the obscenity was not necessary. Issues: Was the defendant's First Amendment freedom of expression right violated? Under a local ordinance which regulates expression through dancing can there be a valid conviction if expert testimony about the obscenity is not admitted? Certiorari denied. Avery v. Maryland, 50 LW 3203.

Issue: For the purpose of determining the appropriate community for jurisdiction in an obscenity case, can criminal conspiracy theory be used to confer jurisdiction upon a community to prosecute anyone for distributing allegedly obscene film anywhere in the country even though the accused is not shown to have participated in the decision to distribute the film into the prosecuting community? Certiorari denied. Peraino v. U.S., 50 LW 3135.

Lower court: The defendant was convicted of possession of obscene films with intent to rent them. Issue: Can a jury which views more than on film at a time properly apply an obscenity test and judge each film "as a whole?" Certiorari denied. Croatan Books, Inc. v. Virginia, 50 LW 3052.

Lower court: The trial court acted properly in determining that a sexually explicit film and magazine were obscene. The evidence supported instructions to the jury about pandering and permitted substitution of "acceptance" for "tolerance" in defining for the jury the nature of community standards. Issues: Were the defendant's First Amendment rights violated when the trial court allowed consideration of whether the material in question had been pandered when no evidence of pandering had been introduced, when the narrower standard of "accept-

ance" was substituted, when the defendant did not know the nature or character of the material's contents, and when the questioned materials are not obscene as a matter of law. Certiorari denied. Sedelbauer v. Indiana, 50 LW 3723.

Issues: Are the First Amendment rights of a defendant violated when the prosecution does not show the defendants knew the contents of a film, the court refused to recognize the relevance of knowledge of the contents, and the government failed to introduce evidence that the defendants, charged with a nationwide conspiracy, knew that "Deep Throat" was being distributed at a given time in the locale where the indictment was returned? Does use of a nationwide conspiracy charge remove the significance of local contemporary community standards as set forth in Miller v. California, 413 U.S. 15 (1973)? Certiorari denied. Battista v. U.S., 50 LW 3323.

Lower court: The revocation of an entertainment license for conviction of an employee for one incident of "obscene live conduct" is not unlawful censorship. Issue: Is there unconstitutional prior restraint on speech when a license is required for commercial presentation of any act, play, scene, song, dance act, song and dance act, or poetry recitation? Certiorari denied. Doyle, Inc. v. County of Los Angeles, 50 LW 3160.

Issue: Does an Idaho nuisance law constitute prior restraint if it authorizes the closing of real property after finding that allegedly obscene but presumably protected materials were disseminated from the premises? Probable jurisdiction. U.S. Marketing, Inc. v. Idaho, 50 LW 3496.

PRISONS

Lower court: Institutional security and First Amendment rights are both protected by a prison system rule which requires that inmates receive books, magazines, and newspapers from no source other than the publishers. Issue: Is it an unconstitutional restraint on First Amendment rights to apply a "publishers only" rule to prison inmates? Certiorari denied. In re Rich, 50 LW 3256.

ANTI-PORNOGRAPHY CAMPAIGNS: A CASE STUDY

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In 1973 the United States Supreme Court gave individual communities more freedom to use "local standards" in regulating the sale of sexually explicit materials. Since that time there has been a shift in the strategy of anti-pornography groups. Instead of urging the prosecution of distributors of such materials under state or federal law, many groups have chosen to crusade for local anti-pornography ordinances. Ordinances are sometimes proposed where there appears to be no need for such control, and if passed are seldom strictly or consistently enforced. The punishment for violation is small, usually a fine averaging from $20 to $200. There is no imprisonment except where a convicted violator is unwilling or unable to pay the fine. The ordinances appear to have little effect on the amount or type of sexually explicit material available. Yet the campaigns for and against the passage of these ordinances is often vicious.

The campaigns associated with attempts to pass ordinances regulating the sale of pornography might be a worthy area of study for the communication scholar. Teachers and students of the First Amendment have consistently studied how availability of sexually explicit material has been affected by judicial interpretations of the First Amendment. They have also explored the effect of historical contexts and current events on freedom of expression. The history of literary suppression is long and the attempt, legal and otherwise, of one group to determine what others read or view has occurred in schools, in bookstores, in libraries and in places of adult entertainment. The freedom of speech scholar is always interested in why these attempts at suppression are made, who is involved in them, under what conditions they are successful and what the long run effects on freedom of speech are. In the freedom of speech classroom, legal decisions are studied to discover trends and arguments. This is of course necessary. Too seldom, however, do those of us who study this area look at real life situations. Yale Professor Thomas I. Emerson has said that First Amendment scholarship is seriously lacking in studies of what happened in specific areas at specific times.[1] It is hoped that a case by case study of recent anti-pornography campaigns might help fill this gap in First Amendment literature.

It is also hoped, however, that a study of anti-pornography campaigns will be of interest to other communication scholars. Each of these crusades is a study of persuasion, argumentation and conflict. Perhaps an examination of the sources, messages and methods used in successful and unsuccessful campaigns will tell us something about how people are persuaded, particularly how this persuasion process works in areas of moral values, religious traditions and sexual expression.

Thus, in an effort to find out something about real life free speech conflicts and the persuasion involved in them, anti-pornography campaigns in several midwestern cities will be studied. This is the first of these case studies. The city is La Crosse, Wisconsin.

There are several reasons for starting with this city. For one thing, the conflict over an anti-pornography ordinance in La Crosse was hard fought, sometimes violent. The Milwaukee Journal reported that during the campaign two of the adult bookstores in La Crosse were set on fire and a third was firebombed.[2] Thus, it was an "interesting" campaign and well covered in the press. In addition, if there was ever a typical midwestern city, it is probably La Crosse. It has been rated an "All American City," and its citizens are very proud of that. It has a rather typical population of university students, blue collar workers, professionals and some old, wealthy families. There is a heavy

religious influence. It seemed a good place to start.

Several sources of information were used in studying the La Crosse example. The first was the La Crosse Tribune, the city's only daily newspaper. Each issue during the relevant period before, during and after the campaign was read and analyzed. The city was visited several times. Bookstore owners and managers were interviewed. Long discussions and correspondence were conducted with many of the activists in the campaign as well as with non-partisan observers in the city. Literature distributed by opponents and proponents of the ordinance was collected. From these sources the following anatomy of a pornography conflict emerges.

Chronology

The pornography controversy began in La Crosse on August 11, 1977, when the City Council voted to deny Brian Benson, owner of Best Buys Adult Bookstore, a license to operate a 77 seat adult movie theater. Following the denial, two La Crosse aldermen introduced an ordinance to ban distribution of pornographic material.[3] Late in August some citizens went to City Hall to urge members of the council's Judiciary and Administration Committee to recommend passage of the council's Judiciary and Administration Committee to recommend passage of the legislation. The committee endorsed the measure on a 6-1 vote. At a Committee of the Whole meeting a week later, however, the legislation was put on the back burner by aldermen who tabled it for thirty days.

Two weeks later some smut foes gathered and formed a group called Citizens for Decency in La Crosse. Members immediately began a petition drive urging aldermen to adopt the pornography ordinance. Despite receiving 2,500 signatures supporting the measure, the Judiciary and Administration Committee rejected the legislation in favor of a ban on smut distribution to minors only. The Committee of the Whole again tabled the whole issue, including the ban to minors, for another thirty days. On October 13, 1977, the City Council passed the ordinance against exposing children to pornographic materials and on December 7, 1977, rejected by a vote of 11 to 7 an ordinance directed against the sale of pornography to adults. At that time petitions were circulated to put the matter to a binding referendum to be held on April 4, 1978. Enough signatures were obtained; the referendum was held and the pornography ordinance was passed. After the passage the mayor called for selective enforcement, the chairman of the City Council said expense would make it difficult to enforce the ordinance and one of the alderman who had supported the ordinance said he assumed that the police had bigger criminal fish to fry.[4]

Setting

La Crosse, Wisconsin is an old river town on the banks of the Mississippi with a population of about 50,000 people. Its natural setting is lovely; it is in "God's Country." While it is the home of the University of Wisconsin-La Crosse, it is largely a blue collar town. Industries include the Trane Company which manufactures heating and air conditioning equipment, the La Crosse Rubber Mills which makes rubber footwear, Jack Winter, manufacturer of women's fashions and, of course, the G. Heileman Brewing Company. Compared to the rest of Wisconsin, La Crosse has slightly more old people and fewer people with higher incomes. There are 51 Protestant churches and eleven Catholic parishes. There are many Germans among the population as well as a large segment of Scandinavians.[5]

The city of La Crosse has some lovely old homes and the university area is nice, but "downtown" is old and grubby. Third Street is where the action is. Streets begin their numbering at the River, so Third Street is not far from its banks. It is a street full of bars; one local writer described it as a "moveable feast" with college kids, truck drivers and brewery workers moving from one bar to another carrying their glasses and beer cans with them. These are not sophisticated cocktail lounges. They have names such as "The Huddle," "Custer's Last Stand," and "Sally and Vern's." On a Friday afternoon last

spring several bars were jammed, but one was almost totally empty except for a bartender playing a new pinball machine which emitted groaning noises at appropriate times. One patron wandered in and commented that the "cops" were crawling all over the place. The area is a rough looking, seedy, run down part of town, and it has a long and colorful history. The La Crosse Tribune noted, "La Crosse as a tough river town has always had its share of prostitution, drinkers, gamblers and the like. And some of the good burghers have crossed over every now and then to sample the wilder side of La Crosse."[6]

The wilder side of town also includes three adult bookstores. Two are on Third Street and a third is on Main which intersects Third. The two on Third Street are called "Best Buys" and "Alley Kat." "Pure Pleasure" is in a slightly more sedate part of town, not far from the Christian Science Reading Room and two "regular" bookstores, one of which has a sign in its window noting, "Those who read more, achieve more!" I did not see such a sign in the adult stores. "Pure Pleasure" is completely boarded up with heavy plywood and one must step down several steps before entering through a heavy wooden door. It was one of the stores which was firebombed. The clerk commented, "They don't like us much here."[7] Apparently that sentiment was a surprise to the Tribune which commented, "La Crosse has always seemed to have two distinct populations; a large group of God-fearing citizens and a relatively smaller, more libertine group of night life devotees. The groups have generally managed to coexist without geting in each other's way."[8] That peaceful coexistence was violated during the porno fight.

The manager of the "Best Buys" bookstore said that he ran the place with his wife and had done so for eight years. He claimed that some of the "best people" in town were his customers. He did not think that the passage of the pornography ordinance had had any effect either on business or on the type of material he stocked--although he said that during the actual campaign, business had picked up a little.[9] Apparently, until 1977 the adult bookstores had been largely ignored. The district attorney, for example, said that he had never been asked to enforce the state's obscenity law against the bookstores or anyone else, and if any complaints were made in the future he would have to find out how the process worked.[10]

Immediately prior to the beginning of the anti-pornography campaign, however, there had been some arrests for drugs and prostitution and one alderman stated that the city had fallen into "moral decay."[11] Mayor Zielke speculated that the referendum was a message from a community disenchanted with the "amount of vice exposed recently."[12] That alternate life styles and the "new morality" had also aroused some of the citizens seemed obvious in a letter to the editor of the Tribune. The writer clearly thought the pornography ordinance was only the beginning. He wrote:

> Let's get the nudity off the streets and public places now: the gals wearing see-thru tops and no bras plus sometimes no tops. Also these gals that hitch-hike. Then when something does happen they cry uncle.[13]

In this setting the anti-pornography crusade took place.

Cast of Characters: Pro Ordinance

Who were the people in favor of the pornography ordinance? In answer to that question the Editor of the LaCrosse Tribune wrote:

> In general the leaders were persons of above average income and educational levels, and most were in the age range to have teenage children. All, I think, have what today's sociologists call "high profiles" in the community and civil affairs.

> Among the leaders were: a Lutheran pastor and his wife; a surgeon at one of the city's major medical clinics; another physician related to the first, the wife of the administrator of St. Francis Medical Center; and a couple of aldermen.
>
> With the exception of the Lutheran pastor and his wife, all of the above mentioned are Catholics. It appeared that a considerable amount of support for the anti-pornography campaign came from the rather large Roman Catholic Community of La Crosse. I don't think the Diocese of La Cross was directly involved, but in the first financial report filed with the City Clerk as a political organization, the Citizens for Decency in La Crosse reported most of its support from various Catholic parishes.[14]

One of the Tribune writers also described the anti-pornography group.

> Most of those involved in leading the effort were either well-to-do professional people or the wives of these people. Most lived in very comfortable areas of the city and threw a cocktail party the night of the referendum to celebrate. The party was attended by a small nucleus of people involved in the CDL drive. Most were college educated or the spouses of the college educated.[15]

The proponents of the ordinance were organized through an organization called Citizens for Decency in La Crosse. This group was affiliated in a loose way and helped by the national organization, Citizens for Decency Through Law. Who were the individuals active in this group? What motivated them? What were their arguments? Dennis Chapman of the Tribune wrote:

> As far as motivation, it seemed that these people were genuinely interested in the moral character of the community. One of their pointed concerns was that pornography was filtering down to the junior high and grade school levels. Personally, I also believe that many involved were repulsed at the very notion that an adult bookstore could prosper in "God's Country" or "America's Number One City." Some concern was also shown about bookstore owners' negligence in allowing minors into the stores.[16]

There were several categories of people in this group. There were two aldermen who originally introduced the unsuccessful legislation to ban smut from the city limits. One of these, Donald Medinger, verbalized several concerns. He was disturbed by the sale of pornography in his All American City. He said, "Let them go outside and buy it, but not in La Crosse. Let them get it by mail order. We want to stay number one."[17] Medinger also thought that viewers of pornography are stimulated to commit sex crimes. "I definitely think it is a great problem. These guys get excited and go out and grab whatever they can get." He repeatedly charged that La Crosse had fallen into "moral decay," and said it was the duty of the city to set standards. He said that enforcement of the ordinance would be simple. "It's black and white," he said. "If it's black you put them in jail and fine them. Absolutely it's enforceable. We've got two city attorneys, the police and a district attorney. You can't say it's not enforceable. What the hell, the Supreme Court says we have the right and duty to enforce it."[18]

His co-sponsor, Alderman Keith Ellison, had a different attitude. He favored the ban as a preventive measure to keep pornography in check and was not interested in banning it entirely. He said, "I would hope the ardent militant saviors of society are not going to get what they want. Discrete prosecution of some of the more patently offensive pornography could be the key

to making any ordinance work."[19]

It would appear as if Ellison were in the minority among the militant supporters of the ordinance. A quite ardent and active group of supporters came from the churches. One of the most vocal of these was Msgr. Wegener, author of an article urging the ban which he entitled, "Nature Vomits,"[20] A more moderate representative was from the Island Park Baptist Church. He said, "I don't think people need this kind of thing in their lives. It is just not a healthy atmosphere. It is not a process of mind building. It is mind decaying. It just causes problems in people's lives."[21]

A third representative from the churches was Rev. Gerald Fisher [illegible] James Church. He compared the Dodo in Lewis Carroll's Alice in Wonde[illegible] the opponents of the ordinance. He wrote.

> To my mind the Dodo represents present day liberals whose permissive attitudes reduce the rules and the goal of life to one big ego trip.
>
> Although some liberals are active in nearly every cause, one issue which brings them out faster than sap from a maple is any community effort to end porno trafficking. As soon as citizens unite for the purpose of defining community standards, porno peddlers can bank upon the liberal establishment to charge onto the scene waving a copy of the Constitution and declaring a readiness to save the public from censorship, book burning and thought control.
>
> By cleverly tying these Hitlerian images to those pressing for local controls, smut-hut owners hope to make their opponents look as stupid as Sgt. Schultz of Hogan's Heroes.
>
> I urge La Crosse voters to back the porno referendum It will be your way of exercising the "community standards" dictum of the Supreme Court justices.[22]

During the early part of the campaign most of the work was done by women, who circulated petitions to get the ordinance on the ballot. One of the most active was Audrey Gilmore, an organizer and spokeswoman for CDL. She was clearly offended by pornography and described it as "perversion." "It's not natural sex--it's the opposite of good sex."[23] Mrs. Gilmore was a minister's wife. She was shocked that "most people don't know what pornography is." Many people apparently thought she was talking about Playboy. She asserted that it was not pornographic even though it was offensive. She said many times that she was talking about what was sold in the adult bookstores, that it was perversion and that the Supreme Court had said that communities did not have to put up with its sale. She said, "The Supreme Court says if it has no value to society and if we don't want to tolerate it, we don't have to." It disturbed her that the state law was not being enforced. She thought a local ordinance would be.[24]

Another woman active in the campaign was Maxine Kroner. Her basic argument was that most people are against pornography, but many are apathetic and have been led to believe their rights would be violated by this type of ordinance. She did not believe that was true. Her second argument was that "if published material depicts an unusual and perverted, distorted picture of sex, then the people who read and view that material are bound to absorb and reflect those attitudes eventually. This is the theory that our whole educational system is based on, that visual aids and books teach--otherwise we've wasted a lot of money."[25]

Later in the campaign some others became actively involved. One of these was Robert Goliwas, who helped organize a "March for Decency" on the last Sunday

before election which involved about two hundred and fifty people. He wanted, he said, to set a standard of decency in the community. He added, "You have to draw the line somewhere. I was absolutely stunned when I saw the material sold in the city of La Crosse. I have lived in other cities, but I have never seen anything like this."[26] As a matter of fact, the material in La Crosse was and is typical of that found in just about any adult bookstore.

The basic arguments, then, used by La Crosse citizens who favored the ordinance were that it was needed to fight moral decay, to fight sex crimes and to keep La Crosse as A Number One All American Christian City. Furthermore, such an ordinance had been authorized if not mandated by the Supreme Court and it was not censorship.

There were two other significant fighters in favor of the ordinance. One was the La Crosse Tribune. This paper took a presumably objective view during the campaign, stated in an early editorial that the editors were weighing the issues, published stories and printed advertisements for both sides and then eventually, after what appeared to be extensive soul-searching, came out in favor of the ordinance. It was interesting to follow the process although an editorial appearing in the paper more than a year earlier predicted what the outcome would be. That editorial was entitled "A Limit on Smut," and in it the editor discussed the conviction of Larry Flynt. The concluding sentence was, "Flynt's conviction offers some hope that community wishes can be expressed and enforced."[27]

The month before the election coverage in the Tribune was quite evenly divided. On March 12th, the paper presented arguments on both sides.[28] On March 22nd, the terms and fines of the proposed ban were listed and several stories were run which presented arguments opposing the ban.[29] In one story, Rita Pacyna of the Tribune staff reported on a speech by Fond du Lac City Attorney, John Keefe, in which he said that he did not believe it was necessary to pass a city ordinance prohibiting the sale of sexually explicit materials because the state statute was a better remedy.[30] In a second story on the same page, however, Stevens Point City Attorney, Louis Motespske, was quoted as saying that while such an ordinance does not mean that adult bookstore owners close up shop, it may serve as a deterrent for prospective bookstore owners.[31] A third story by Dennis Chapman quoted La Crosse City Attorney, John Flanagan, who said that he had spoken with city attorneys in cities with similar prohibitions and had been given bleak and frustrating accounts. "Some city attorneys have called the ordinances next defeating," he said.[32]

On March 26th the Tribune came out in favor of the ordinance in an editorial entitled, "Setting Standards."[33] The editors explained the ordinance, argued that the First Amendment had never meant complete license and that the government has routinely regulated morality. The target of the ordinance was described as "a type of sexual depiction that serves to desensitize us against our baser side that has turned some of our cities into unhealthy and dangerous places."[34] The editor noted that the Tribune had been voluntarily censoring advertisements and that abuses of the ordinance would have to be guarded against. The editorial concluded with the statement that "the Supreme Court has advised that communities will set their own standards," and that "the ordinance is not being imposed by government. It will be accepted or rejected by the people of La Crosse and we applaud the attempt by a community to set its own standards of decency."[35]

Immediately next to the editorial was an article by Irving Kristol which concluded, "I'll put it bluntly. If you care for the quality of life in our American democracy, then you have to be for censorship."[36]

The Tribune published a series of paid advertisements for each side of the controversy. The one for the anti-ordinance forces may have been counter-productive. It was a series of five ads answering questions about censorship. The first two ads listed 27 national groups opposing censorship which included

several national church organizations, academic and civil liberties groups. These ads were challenged by some La Crosse clergymen and it indeed turned out that the particular statement included in the advertisement was a "statement of concern" which was drafted by the National Coalition Against Censorship and which had not been specifically endorsed by all of the members of that coalition. The challenge and the response to it received prominent coverage in the Tribune and the general impression was that the anti-ordinance forces had exaggerated their claims.[37]

The impression was played up further by the ads of the pro-ordinance group charging that the opposition was continually repeating bits of misinformation. Their headline cautioned, "Don't Be Misled! The Citizens of La Crosse have a Right to Set a Standard of Decency for this City."[38] The advertisement urged the people to "Vote Yes to Set a Community Standard," and made a point of distinguishing between telling people what they could read or see, which they said the ordinance did not, and telling stores what they could sell, which the ban did.

Everyone interviewed on either side of the controversy considered the position of the Tribune to have been vitally important in the campaign. Those favoring the ban though the editors of the paper represented "their" logical approach of weighing the arguments and coming out in favor of the ordinance. Those opposed did not agree that the editors had honestly weighted the arguments, but they did think it was effective strategy to appear to have done so.

The final advocate for the ordinance was the national organization, Citizens for Decency Through Law. That California based group will send expert organizers into any community interested in fighting pornography. They will help form a local chapter, provide literature and speakers and suggest other strategies. In La Crosse the national CDL representative was Murray Norris, President of Christian Family Renewal and Valley Christian College of Fresno, California. Opponents said that Valley Christian College was a mail order degree mill. It does not have state accreditation. In an interview for the Tribune, Norris said his organization "discovered a long time ago that 'Christians could win' against such things as pornography if they want to." He said:

> We try to spread the news from one place to another. If they win someplace, we try to take the message to the next town.
>
> Winning techniques, such as passing law and enforcing it, petitions, education through a telethon and mass mailings are offered to different communities.

If conventional methods fail, however, there are others, which he would not name. "There's no sense in educating the enemy."[39]

In La Crosse strategies included dropping 17,000 News For Good Neighbors newspapers at homes and the "March for Decency." It also included a kick-off speech by Norris in which his argument was that 85 to 90% of pornographic material ends up in the hands of children and children imitate what they see. He also said that in San Francisco the highest rate of forcible rape takes place in an area where there are pornographic movie houses, that the University of Texas student who climbed to a tower and shot several people wanted to be a pornographer and that Richard Speck (whom he misnamed Charles), the murderer of student nurses, was a porno user.[40]

News for Good Neighbors is a newspaper published in Clovis, California by Christian Family Renewal and is edited by Murray Norris.[41] It contains such stories as "Polls Show Most People Want Action Against Smut," "Official Report Connects Rape, Torture and Pornography," "Pornography Incites Sex Crimes," and "Pornographers Turn Cameras on Children."[42] It also contains order blanks for tapes and books with instructions about how to fight against pornography, discusses the right and wrong way to fight and claims, "There're (sic) winning

over immorality, you can too!"[43] The writing is generally poor, there are many spelling and grammatical errors and the style is sensationalism. It is written on cheap paper and the name of the current target city is inserted on the front page. It is not a paper one would expect to appeal to the educated person.

Cast of Characters: Against the Ordinance

On March 8, 1978 the La Crosse Gazette a short-lived weekly newspaper, carried the headline, "New Group Fights Censorship." The first paragraph noted, "Claiming a mandate from the framers of the United States Constitution's Bill of Rights, a group has organized to oppose censorship."[44] The three people mentioned in the article were Hal G. Scheie, owner of the River City Palace Bar, Dale Kendrick, a University of Wisconsin-La Crosse art professor, and Donald Harmon, a local attorney. Kendrick declined to reveal the exact membership numbers saying, "The group is new and membership is small." He did say, however, that La Crosse Voters Against Censorship was affiliated with both the National Coalition Against Censorship and the National Ad Hoc Committee Against Censorship. The article also announced that a fund raising gathering would be held at the River City Palace on Sunday, March 11th.

The three men identified in the Gazette article were virtually the entire campaign against the ordinance. Their strategies consisted of speeches by Kendrick to the City Council, letters by all three to the La Crosse Tribune and paid advertisements in the Tribune and in the UW-La Crosse student newspaper. They were aided by the owners and managers of the three bookstores who attempted to secure signatures against the ordinance from their customers and who also paid for some advertisements in which they were identified as sponsors. The other source of funds came from the fund raising at the River City Palace which was attended by, according to Kendrick, "all the interesting people in town, that is, the girls from the sauna baths, their madam, the gay community and some of the few blacks in town."[45]

The three anti-ordinance people attempted to focus the fight against censorship, not in favor of pornography. Scheie was quoted in the Tribune as saying that while he and other members of his group didn't necessarily read or use the sexually explicit materials sold in adult bookstores, they did support the right of persons interested in the material to have it. Schei added, "There's no such thing as a little censorship."[46] The other basic approach of the group was to attack the credibility of their opponents, their use of children in distributing material and the representative from the national CDL office whom they accused of using "hysteria and half-truths."[47] An example of Schei's attack on the credibility of his opponents occurred in the "letters" section of the Tribune. Schei wrote:

> An amazing example of how power corrupts can be seen in Alderman Keith Ellison's so called pornography ordinance.
>
> For years before his election, letters from Mr. Ellison appeared regularly in the Tribune speaking against government interference in citizens' private lives, the Harborview mistake, and other abuses of a Big Brother government. Now that he is on the Council, his first act is to tell the citizens what they may or may not read and view. He and others on the council seem to have forgotten why this country was founded.[48]

Another common attack on credibility was to accuse the churches of falling down on their job and thus having to have the city do their work for them. One letter to the Editor noted:

> The Clergy has finally admitted defeat to communicate morals to their congregations. First clergymen have asked the state to legislate laws governing abortion and now have asked the law to control pornography.

> Not too much has been said about alcoholics, communal living or drugs.
>
> Had they properly communicated there would be no use of control to any of the above. It's about time we evaluate their effectiveness and in so doing tighten our pocketbooks.[49]

The second member of the group was La Crosse lawyer, Donald Harmon. He argued that while most persons say they are against pornography, those people do not see the problem as one needing controls. He said that rational people realized that "there are other things such as survival on our planet which have more importance."[50] He also refuted the CDL argument about the effect of pornography. He argued that "There is no satisfactory evidence that pornography is the cause of all mankind's ills, adding that studies have shown that repeated exposure to pornography results in boredom with the subject rather than an increase in sex crimes and that persons committing sex crimes "have been underexposed to pornographic material rather than overexposed."[51]

Undoubtedly, the most vocal member of the trio was Dale Kendrick. He had taught in the art department of UW-La Crosse for seventeen years and was, and still is teaching a popular course in erotic art. Kendrick's concern about censorship dated back to 1970 when he wrote to Wisconsin Attorney General Robert Warren and to La Crosse District Attorney Burleigh Randolph expressing his worries about possible censorship of works of art.[52] In October, 1977, shortly after the idea of an ordinance had been introduced to the Common Council, Kendrick gave the first of several speeches to that group protesting that an anti-pornography ordinance violated the "visual sanctuary" of the citizenry. During October and November he spoke five times to the City Council.[53] In March, when the referendum became the issue, he helped form LCVAC and on March 13th began a series of letters to the editor in which he attacked the proposed ordinance and the La Crosse Tribune or "Teddy Tribune" as he called it.[54] He charged the paper with sloppy reporting, misquotation and "rearranging things to give the wrong impression." He objected to the editorial in which the Tribune had outlined arguments for and against the ordinance. He disliked the manner in which things were explained and the "good and bad guy imagery." He doubted the Tribune's objectivity. Hendrick wrote:

> The Tribune cannot make up its mind about the referendum either. If it supports a no vote against the referendum, the Tribune will appear to support the libertines and lose the support of the much larger group of God-fearing citizens. And if it votes yes to bringing about an act of censorship, perhaps the Tribune should close down its presses and silently creep away. Economically, we all know the Tribune will have to vote yes![55]

Kendrick also wanted to make it clear that the issue was not pornography but censorship. He wrote:

> Censorship is scarcely more complex than someone's saying, "No you cannot read or buy that magazine or book or see that film--because I object to it! People who promote censorship justify their cause by their own self-proclaimed god-like superiority in other words, ordinary citizens cannot be trusted to make up their own minds. Phooey![56]

Dale Kendrick was interviewed at some length. He is an enthusiastic foe of censorship and seemed to have had the time of his life fighting the ordinance. He traced the whole anti-pornography movement to Watergate and the interest of the American people in reform. He said that the "ministerial conspiracy" was taking advantage of this desire for cleansing. He was pleased to be grouped with those "libertines" whom he described as the most interesting people in

La Crosse. He discussed the threatening letters he and his two associates had received and said that at one time he had feared for the safety of his family. He was clearly a crusader, and talked with relish of forming caravans to attend X rated movies in Minneapolis in order to be among the ones who were publicly identified as opposing attempts to intimidate people.[57]

Kendrick was proud of his course in erotic art and discussed what he perceived to be the problems of people who were unable to handle such material. He was exuberant, enthusiastic and sorry the campaign was over even if his group of three had lost every ward except the university. He was a colorful, interesting person. His language was also colorful. As we left the restaurant where we had had lunch, for example, he considerately asked me if I wanted to "hit the pot."

A very few other people could be identified as opponents of the ordinance although they were not active in the campaign. There were a couple of Letters to the Editor opposing the ban and one Alderwoman, Hellen Kelly, expressed concern that voters would choose to infringe on personal freedom because they were offended by smut. She said:

> Once you allow the government to regulate the kind of things people are reading, then the door is wide open for other government abuse. I am very concerned with government getting involved in the private activities of people. I don't think it (morality) is something a community can regulate.[58]

Ms. Kelly also said that she did not recognize pornography as a pressing problem in La Crosse. "As long as these places are not standing on the street hauling people in, I don't see a problem. I'm not offended by it because I'm certainly not in contact with it." She said that it was difficult for many aldermen to come to grips with this problem because "it is an issue charged with emotionalism and irrational behavior on both sides."[59]

So the opposition to the ordinance was small, though vocal. Its argument was basically that censorship was bad and the ordinance constituted censorship. The group did attempt to answer the argument about pornography causing crime, but did not answer two other important pro-ordinance arguments--that the Supreme Court had practically told them to formulate such an ordinance and that pornography promoted moral decay. They attacked the credibility of the CDL and the Tribune as well as some individuals, but the attack seemed more ad hominem than logical. They did not seem to succeed in making the issue one of censorship.

Conclusions

Prior to the beginning of the pornography conflict in 1977 most people in La Crosse seemed to have been ignorant or at least apathetic about the existence of adult bookstores in the city. These bookstores had existed for years without incident. Immediately prior to the conflict there had been some well publicized arrests for drugs and prostitution. Some of the citizenry was apparently shocked that their All American City included such things. There is evidence to suggest that many wondered what the fuss was all about when Citizens for Decency in La Crosse was formed and then became quite shocked when they were exposed to what actually was being sold in the three adult bookstores. Such a reaction would be entirely consistent with what I have observed in ten years of teaching classes in freedom of speech. Few of my upperdivision and graduate students have seen real pornography and their reaction is almost always shock and revulsion. As my daughters would say, they are totally "grossed out." The material does not appear either natural or beneficial.

Given that situation and the line up of combatants, one is tempted to say that the anti-ordinance people didn't have a chance. A rhetorical critic would have a field day with a Burkeian analysis. The good guys and the bad guys were clear. While a relatively small number of people were organized in favor

of the ordinance, they were the "good" people. They were church figures, mothers, community leaders and were finally joined by the local newspaper. Furthermore, they were able to use the prestige of the United States Supreme Court. They had a name that called for "Decency." Their tactics involved a "March for Decency" which included families and children who handed out "News for Good Neighbors." These were the good guys, and the contrast with the opposition was dramatic. The most active of the "pro-pornography" forces was a "flakey" art professor who taught a course in erotic art and wrote letter after letter to the newspaper attacking "Teddy Tribune" in a manner that was not particularly humorous or logical and who showed up at every city council meeting talking about something called the "visual sanctuary." The second of the three "bad buys" was a tavern owner and the third was a liberal lawyer. All three were backed by "smut sellers." Outstanding citizens in small cities do not usually own or operate smut bookstores and these three places were not particularly attractive. Instead of a "March for Decency," the anti-ordinance group had a fund raiser at a local bar on a Sunday attended by "the most interesting people in town." Notably absent from the conflict were those groups of respectable liberals usually found in such situations. The American Civil Liberties Union did not participate nor did the local library group, or any other member of the university faculty. And finally, the usual fighter for First Amendment Rights--the press--was on the other side.

It is of course not possible to generalize from one case study. One could tentatively hypothesize, however, that the ability to identify people supporting the proposed ordinance with high prestige sources is an important factor in such anti-pornography campaigns. The one strong "term" the anti-ordinance forces had on their side was the term "censorship." In this case that appeared to be overweighed by the ammunition of the pro-ordinance group. Perhaps an investigation into the situation in Janesville, Wisconsin where the results were different and the newspaper was on the other side will further confirm this hypothesis. That will be the next case study.

Endnotes

[1]Thomas I. Emerson, Toward a General Theory of the First Amendment, (New York: Random House, 1966), p. 22.

[2]"Winning a Battle Doesn't End War on Porn," Milwaukee Journal, April 23, 1978, p. 1.

[3]The ordinance was: "It shall be unlawful for any person to exhibit, distribute or offer to distribute or have in his possession with intent to distribute any material portraying sado-masochistic abuse, sexual conduct or nudity which is pornographic. It shall be unlawful for any person to give, advertise, produce, exhibit or perform in any performance which is pornographic in any playhouse, theater, hall or other place within the city." Public library systems and libraries operated by accredited educational institutions are exempted from the provisions of this ordinance.

[4]"Porno Ban Approved," La Crosse Tribune, April 5, 1978, p. 1.

[5]Coulee Region Statistical Profile prepared by La Crosse Chamber of Commerce.

[6]"Editorial," La Crosse Tribune, March 12, 1979, p. 2.

[7]Personal Interview.

[8]"Editorial," La Crosse Tribune, March 12, 1979, p. 2.

[9]Personal Interview, April 30, 1978, April 18, 1979.

[10]Rita Pacyna, "State Porn Ban Called Tough," La Crosse Tribune, March 22, 1978, p. 4.

[11]"Porn Ban: Personal Freedom Showdown," La Crosse Tribune, March 21, 1978, p. 4.

[12]"Porno Ban Approved," La Crosse Tribune, April 5, 1978, p. 1.

[13]"Letters to the Editor," La Crosse Tribune, May 2, 1978, p. 7.

[14]Personel Letter, December 3, 1979.

[15]Personal Letter, November 30, 1979.

[16]Personal Letter, September 4, 1979.

[17]"Porn Ban: Personal Freedom Showdown," La Crosse Tribune, March 21, 1978, p. 4.

[18]Ibid.

[19]Ibid.

[20]Wegener, "Nature Vomits," La Crosse Tribune, March 20, 1978.

[21]"Letters to the Editor," La Crosse Tribune, April 4, 1978, p. 4.

[22]"Anti-Porno Law," La Crosse Tribune, April 1, 1978, p. 4.

[23]"Porn Ban," La Crosse Tribune, March 21, 1978, p. 4.

[24]Ibid.

[25]"Porn Ban," La Crosse Tribune, March 21, 1978, p. 4.

[26]"Letters to the Editor," La Crosse Tribune, March 31, 1978, p. 3.

[27]"A Limit On Smut," La Crosse Tribune, February 14, 1977, p. 4.

[28]La Crosse Tribune, March 12, 1978.

[29]"Terms, Fines Listed in Proposed Ban," La Crosse Tribune, March 22, 1978, p. 4.

[30]Rita Pacyna, "Localized Smut Laws Have Pluses, Limits," La Cross Tribune, March 22, 1978, p. 4.

[31]"State Porn Ban Called Touch," La Crosse Tribune, March 21, 1978, p. 4.

[32]Dennis Chapman, "Porn: No Easy Solutions," La Crosse Tribune, March 22, 1978, p. 4.

[33]"Setting Standards," La Crosse Tribune, March 26, 1978, p. 2.

[34]Ibid.

[35]Ibid.

[36]Irving Kristol, "Liberty or License," La Crosse Tribune, March 26, 1978, p. 2.

[37]"Anti-Censorship Ad Challenged," La Crosse Tribune, March 30, 1978, p. 1; "Clergymen to Fight Anti-Censorship Ads," La Crosse Tribune, March 31, 1978, p. 2.

[38]La Crosse Tribune, April 1, 1978, p. 2.

[39]"250 Spread Word Against Open Porn," La Crosse Tribune, April 3, 1978,

p. 1.

[40]"Porn Foe Paper Called 'Hysteria'," La Crosse Tribune,April 3, 1978, p.1.

[41]News For Good Neighbors, Vol. 8, No. 1.

[42]Ibid.

[43]Ibid.

[44]"New Group Fights Censorship," La Crosse Gazette, March 8, 1978.

[45]Personal Interview, April 18, 1979.

[46]La Crosse Tribune, March 21, 1978.

[47]La Crosse Tribune, April 3, 1978.

[48]"Right to Choose," La Crosse Tribune, November 10, 1977.

[49]"Morals," La Crosse Tribune, April 3, 1978.

[50]Ibid.

[51]Ibid.

[52]Personal Interview, April 18, 1979.

[53]Ibid.

[54]"Letters to the Editor," La Crosse Tribune, March 13, 1978.

[55]"Letters to the Editor," La Crosse Tribune, March 22, 1978.

[56]"Letters to the Editor," La Crosse Tribune, March 31, 1978.

[57]Personal Interview, April 18, 1979.

[58]La Crosse Tribune, March 21, 1978, p. 4.

[59]Ibid.

HUMAN RIGHTS IN EL SALVADOR: A CASE STUDY OF THE ADVOCACY OF ARCHBISHOP OSCAR ROMERO

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The assassination of Archbishop Oscar Romero temporarily silenced the voice of this "prophet of human rights" in El Salvador.[1] He died while saying a funeral mass on March 24, 1980. A eulogist described the circumstances: "His homily was on justice and peace--rare commodities in impoverished and violent El Salvador. In the act of consecrating the host, the Archbishop raised the chalice above his head. At that vulnerable moment, there was a flash and a single shot. Romero fell."[2]

Romero's significance as an advocate of human rights is well known. When nominated for the Nobel Peace Prize, he was called "a forthright and compelling advocate of human rights, nonviolence, and social progress--setting a standard in defense of human liberty which can be applied not only in Latin America but throughout the world."[3] Although not the only churchman to speak for the rights of the oppressed, he was renowned as an outspoken member of the clergy who refused to allow "government persecutors to frighten him into silence or submission."[4] His death followed a period of religious oppression conducted by right-wing radicals who circulated pamphlets proclaiming: "Be a Patriot! Kill a priest."[5] Romero was part of a growing group of Latin American religious leaders who considered it their responsibility to "be the voice of the voiceless."[6] His achievement of this advocacy role won him the Swedish Ecumenical Action's 1980 Peace Prize two weeks prior to his assassination. At this time, a Swedish official lauded Romero for his contribution to justice: "When people are tortured and persecuted and have lost their freedom and human living conditions, it is a Christian duty to defend and support them,"[7] and Romero has done so.

Several reasons justify the study of this Catholic clergyman as an advocate of free expression. First, he represents many practitioners of liberation theology who support the liberation of consciousness and rights of free speech, press, and assembly. Second, in El Salvador and other Latin American countries, the church has been a major force in urging the government to permit civil liberties for the masses. Third, Romero's sermons provide important historical records about the need for free expression in El Salvador. Fourth, a case study of Romero's advocacy illustrates the crucial role that religious spokespersons and forums play in the fight for free expression in Latin America. Finally, Romero is an acknowledged martyr, killed because he refused to remain silent about the need for civil liberties in El Salvador.

The purpose of this study of Archbishop Romero is to outline the political conditions and church responses used in Latin America in general and El Salvador in particular to pursue civil liberties. To do so, the essay (1) defines free expression as liberation, (2) outlines the political history of El Salvador and the development of the national security system, (3) explains evangelization as a response to abridgement of civil liberties, and (4) provides a case study of the themes of free expression in the sermons of Archbishop Oscar Romero.

Free Expression as Liberation

Free expression holds a specialized meaning for liberation theologians. Dom Helder Camara, Brazilian theologian, concludes that freedom occurs only when human beings are "consciously aware and free," that is, when they can liberate themselves from "various enslavements" and pursue fundamental liberties on their own.[8] These theologians believe that the large majority of persons in their countries are enslaved by a small number of rich leaders. For example, in El Salvador, grounds for such conclusions seem accurate because ninety

percent of the peasants and two-thirds of the population have no land; two percent of the people own 58 percent of the arable land; the average monthly income of the peasant families, 50 percent of them illiterate, is twelve dollars."[9] Circumstances of this type provided justification for theologians to seek to liberate the poor in their countries from the "ideologies of domination" and lead them to discover the freedom advocated "in the simplicity of the gospel."[10]

These theologians believe that the dominant ideologies of the ruling governments in Latin America safeguard the power of the rich and use this power to control the minds and limit the freedom of the poor majority. For this reason, they stress that ideology limits free thinking; that is, the upper classes are permitted to speak, publish, and assemble to achieve their goals whereas the poor are restricted from such rights because their opinions and actions may threaten the power of the rich majority.[11] Liberation theologians stress that wealthy minorities prohibit the masses from "free associations, free agreements, and free covenants."[12]

Even though such explanations of the impediments to free expression embody assumptions somewhat unique to the Third World, the issues about free expression parallel those of the First Amendment--freedom of religion, speech, press, and assembly.

Liberation theologians seek to secure the rights they believe are guaranteed to the poor through international agreements made by their countries. Whereas most Latin American countries have formally agreed to the civil liberties provided by international covenants, few countries have secured them for the majority of their citizens.[13] For example, El Salvador is party to the following agreements which would promote human rights, including: the UN Declaration on human rights, the OAS Declaration of the Rights and Duties of Man, the four Geneva Conventions of 1949, the Geneva Protocols of 1977, the American Convention on Human Rights, and the UN Covenants on Civil and Political Rights.[14] Despite the fact that the leaders of El Salvador have signed these treaties and agreements, the masses of people still have few civil rights.[15] The political history of the country reveals why these rights have failed to become a reality in El Salvador.

The Political History of El Salvador

Numerous political changes in the governments of El Salvador resulted in violations of the rights of its people including the instability of governments the development of the national security system, and the inconsistent enforcement of existing laws.

The past century in El Salvador reveals a history replete with transgressions of civil liberties. Several events marked the development of these violations: the government legalized serfdom for rural workers in 1907 and mobilized the National Guard in 1912 to protect the landholdings of the ruling families; the peasants rebelled in 1932 and a military junta took charge of the country; the National Guard evicted tenant farmers from their land in 1950; ORDEN, a repressive military police organization, formed in 1960; the country adopted a constitution favorable to human rights in 1962 and engaged in war with Honduras in 1969 resulting in the development of right and left wing revolutionary groups; the military appointed Carlos Humberto Romero as its President in 1977, and the citizens experienced severe repressions under his government; the revolutionary and military factions ousted Carlos Romero in 1979 and a military junta ruled; and right-wing terrorists assassinated Archbishop Oscar Romero in March, 1980.[16] In each of these events, the political scenario repeated itself. First, the government issued reforms favoring or opposing civil liberties. Second, opposition groups openly rebelled against the reforms and the policymakers. Finally, the government was either overthrown or reacted against the opposition by enacting policies repressive to civil liberties.[17]

The instability of El Salvador's government resulted in increasing power for its military and the evolution of the national security ideology. This is an ideology which liberation theologians characterize as a system in which the state acts as "its own power, and that political power is entirely in the hands

of its most representative bearer, the armed forces."[18] Historically, the state enlisted both the support of the military and of the church to achieve its official goals--"to fight communism and to build a new society."[19] The state used the church to reinforce its goals and support its policies through sermons in the pulpit and the pastoral letters of its bishops. For years, the church collaborated with the military, the ruling government, and the fourteen wealthy families of El Salvador to maintain a unified power against the will of the masses.[20] Additionally, U.S. foreign policy sanctioned the national security system and supplied economic and military aid to keep this system in power.[21]

The documents of the Medellin Episcopal Conference for Latin American Bishops decried the effects of the national security system and enlisted church leaders to fight that type of ideology. At this conference, church leaders described this system as one alien to Christian freedom and civil liberties. Comblin stressed, "The national security state confers ultimate purpose on all the activities of the citizens and institutions of the country" irrespective of their wishes.[22] Theologians believed an inherent conflict existed between the state approved ideology and human freedom because the national security system adopted measures necessary to defend its own power and, in doing so, suppressed the rights of the masses for free speech, free press, and right to assemble.

Although the El Salvador Constitution of 1962 clearly promoted the rights of its citizens to free expression, the national security system often adopted provisions that eliminated these rights and used military enforcements to secure the will of the government. Provisions of the 1962 Constitution for free expression included: Article 154 providing for freedom of movement and residence, Article 158 promoting freedom of thought and expression, and Article 159 encouraging the right to organize and assemble publicly.[23] However since 1962, frequent decrees and contravening laws have restricted the rights for free expression. The most repressive of these laws was adopted in 1977 in El Salvador and called the Law for the Defense and Guarantee of Public Order; it justified limiting free expression for the sake of national security.[24]

First, the law restricted citizens' rights to free speech. Article 1, No. 7, specified that "those who propagate, encourage, or use their personal status or circumstance, either by spoken or written word or by any means" which can harm the social order are subject to penalties determined by the government.[25] Subsequent to this adoption, the law has been used to exile non-citizens, arrest and imprison citizens and church leaders, and even to kill dissenters.[26] For example, the military justified firing on Christian community gatherings claiming that church leaders circulated dangerous materials that opposed the government.[27]

Second, this law severely limited the role of the press. Article 1, No. 15, read: "Those who propagate by the spoken or written word, or by any other means, within the country or send abroad, tendentious or false news or information designed to disrupt the constitutional or legal order, the tranquility or security of the country, the economic or monetary system or the stability of public values and public property" are subject to arrest and penalties.[28] This law devastated El Salvador's free press. For example, the law sanctioned bombings, threats and assaults on the country's independent newspapers, forcing them to close down, allowing only for publication of the newspapers which were controlled by the government. Additionally, the military bombed seventeen news offices and radio stations, killing twelve journalists. The church radio stations repeatedly have been bombed and their religious broadcasts blocked.[29]

Third, laws which justify military intervention to maintain the public order severely curtailed the activities of unions, the church, and other groups holding unfavorable views toward the government. Two provisions of this type took the form of government decrees. Decree 296 called for the immediate firing of any employees who strike and imposed harsh penalties on any officials who "have personnel under authority who fail to abide by the law."[30] Amnesty International attributed the deaths of 100 striking workers to

the enforcement of this law.[31] Decree 155 also forbade rights to assembly by imposing "a state of siege on the country," declaring that freedom of movement, residence, thought, expression, and the right to assemble would be suspended for 30 days to ensure the adoption of land reforms.[32] During the time of this decree, Archbishop Romero was murdered and hundreds of people attending his funeral were shot and others arrested.[33]

Thus, the Law for Defense and Guarantee of the Public Order justified both oppression of rights and violent means against violators in order to secure the will of the government. This law posed "a severe threat to civil liberties" and the U.S. State Department, the Inter-American Commission on Human Rights, and the International Commission of Jurists condemned the law.[34] Despite this fact, the U.S. government increased military aid to the country.[35] Even though new government officials who were elected in 1982 said they would restore civil rights, U.S. Congressmen could not get these officials to confirm the guarantee of civil liberties during their visit in June, 1982.[36]

Church Leaders Respond to National Security by Evangelization

Whereas the realities of internal politics and the international relations justified the existence of the national security system, liberation theologians advocated human freedom as a God-given right of every person regardless of financial or land-owning status.[37] The theory underlying liberation theology was outlined in the documents from the Bishops' Conference in Medellin, Columbia in 1968; expanded and developed in the documents of the Latin American Bishops' Conference in Puebla, Mexico in 1979; and applied to relevant statements from Papal encyclicals since 1960. The practice of liberation theology is called "evangelization," a method of action used to awaken the freedom of consciousness of the oppressed majority in El Salvador and elsewhere in Latin America.[38] Archbishop Oscar Romero frequently cited evidence from Medellin, Puebla, and the encyclicals in his sermons; and he offered evangelization as the solution to political and religious oppression in El Salvador.

The Medellin documents stressed the goals of the church in Latin America and influenced the actions of liberal church leaders toward the oppressed majority. Lernoux emphasized: "Medellin produced the Magna Charta of today's persecuted, socially committed church and, as such, rates as one of the major political events of the century."[39] The Medellin papers urged church leaders to take the side of the poor and oppressed people in their countries and, in doing so, to denounce "institutionalized violence and the international imperialism of money" and to commit themselves to the "option of the poor."[40]

Although the documents considered all major economic, social, and religious issues, they do address the theme of human rights. More specifically, Medellin lauded the activity of some bishops, priests and lay people who have been actively involved in defending human rights through sermons, declarations, and publications; it encouraged all religious leaders to become more actively involved in practices leading to freedom for the people of Latin America. Additionally, Medellin urged church leaders to use the social communications media to increase "awareness of justice" and to "defend the rights of the poor and oppressed,"[41] and to join groups such as labor unions, university organizations and peasant groups which will "facilitate popular participation" politics.[42] Lernoux evaluated Medellin as a significant document defining the mission of the Church, defending human rights, and providing a voice for the oppressed.[43]

During the decade following Medellin, church leaders used the guidelines of the document to justify their often radical and aggressive responses toward the national security system. In countries such as Chile, Paraguay, Brazil, Nicaraugua, and El Salvador, the church increased its dissent against the government and the ruling order often through hostile and aggressive actions.[44] By the time of the Puebla conference in 1979, Roman Church leaders decided to exclude many radical Latin American Church liberals from participation.[45]

Despite this fact, Puebla endorsed the goals of Medellin and elaborated the theory and practice of liberation theology for the Church in Latin America.

Pope John Paul II addressed the delegates at Puebla, enunciating the fact that Latin America had experienced "massive increases in violations of human rights" and that church leaders needed to work to secure liberties such as the right to work; the right to peace, freedom and social justice; and the right to participate in making decisions that affect people and nations.[46] Just as Medellin had done, Puebla approached human rights broadly considering social, economic, and religious issues. However, Puebla emphasized the importance of communication as the vehicle for fostering "freedom of expression and its correlate, freedom of information."[47] Specifically, Puebla acknowledged the importance of the mass media, the homily, and the right of the people to organize and express dissent.[48]

Three encyclicals helped to justify the assumptions of liberation theology. Among the most significant encyclicals are Mater et Magistra, 1961, Pacem in Terris, 1963, and Populorum Progression, 1966. These Papal proclamations encouraged church leaders to protest against social domination and "strengthened leftist trends" among Latin American Church leaders.[49]

Liberation theologians viewed freedom as a synonym of Christian values. Comblin concluded: "Where there is no freedom, there is no Christianity. Consequently, the whole activity of evangelization must deal with calling forth freedom in the hearts of human beings."[50] Utilizing this assumption, Puebla specified evangelization as the process of liberating human consciousness so that persons understand, accept, and practice the message of the Gospel. The document reasoned that when the Gospel penetrates into the personal community, and cultural values, the people will recognize the importance of expressing their opinions, exercising their rights, and seeking a more just social order.[51] Christian faith is the basis for evangelization, and this faith is also the rationale for seeking structural changes in oppressive political systems.

Oscar Romero: Advocate of Free Expression

At the time Romero was named as Archbishop of San Salvador in 1977, many religious leaders were disappointed. They believed the Rome-educated Romero would be too intellectual and conservative for the progressive Church in San Salvador.[53] More specifically, the clergy of this diocese feared Romero would side with the national security system and ignore the needs of the people. The Archbishop instead responded to the needs of the people. He came to San Salvador under circumstances of severe repression: in March, Rutillo Grande, a Jesuit priest working with the poor, was murdered; in May, a parish priest, Alfonso Navarro, was kidnapped and murdered; and in November, the government of El Salvador instituted the Law for the Defense and Guarantee of Public Order.[54] During the year, the repression against the church, labor, and Christian groups grew more severe. As a result, Romero overtly condemned the state in his sermons.

Romero soon established himself as an advocate of the rights of the poor. He preached each Sunday in the cathedral in San Salvador. Max Echegaray recalled the context for Romero's preaching: "On Sundays, he would talk an hour, sometimes closer to two. His was 'the voice of those who have no voice' in this small country where much news and critical opinion is suppressed. Some accused him of meddling in politics. But he also meditated on the days' text."[55] The cathedral was always packed with people. Erdozain recalled, "The crowd reached all the way to the altar; those in front were touching it. Many brought snacks with them and sat on the floor."[56] The archdiocesan radio station broadcast the sermons throughout El Salvador. Romero's reputation was so extensive that even "the poorest barrios . . . prominently displayed the Archbishop's picture."[57]

Romero's sermons were longer and more complex than the guidelines established for preaching by Puebla, which suggested the preacher reflect on the sacred text, relate it to the sacrament, and apply it to community life while keeping the length of the sermon proportional to the rest of the liturgy.[58]

Romero preached sermons that lasted twice as long as the rest of the liturgy and developed a novel structure for his sermons. First, he greeted the congregation and the people of El Salvador and made personalized statements about the occasion and the people attending the mass. Second, he reflected on the gospels through the events of the week such as the death of a church worker or the strike of laborers. Next, he talked at length about the violations of human rights in El Salvador listing pertinent cases, calling the congregation to prayer for the suffering people, and pleading with the government to restore rights to the citizens of the country. Finally, he concluded by urging the people to follow the tradition of Jesus and to work for liberation for themselves and the nation. Several sermons demonstrate this structure and develop the theme of free expression.[59] Among them are the following.

January 21, 1979

The sermon entitled "An Assassination Speaks to Us of Resurrection" described the evils of the national security system. Romero began by extolling the goal of human justice: he then contrasted this goal with the reality of death and the repression of rights suffered by the people at the hands of the Salvadoran National Guard and the military police (pp. 33-37). The content of the speech consisted of a chain of reasons indicting the national security system. First, Romero accused the security corps of "falsifying the truth with slander" (p. 38). Next, he urged theological reflection as a method for discerning the causes of personal and institutionalized sin (p. 39). He concluded by ordering the ex-communication of the assassins of Father Octavio Ortiz, whose funeral mass he was offering (p. 39). Romero clearly placed the blame for repression and violence on the social security system and urged the people to react against the sins of the political structure.

July 22, 1979

Romero warned that leaders should be good shepherds of their flocks in a sermon entitled, "Christ: True Shepherd-King of All People." This Sunday sermon followed the success of the Nicaraguan revolution. Romero detailed the destitution and destruction resulting from the bad shepherds who had ruled Nicaragua. He showed how church leaders had worked to bring about the revolution and change the political system so that Nicaraguans could have freedom of information and thought, freedom of worship, repatriation, and a more just government (pp. 56-57). He explained his hope that his "country will not have to undergo a bloodbath to obtain such rights which are not gifts or favors from the government, but simply the rights of human persons (p. 59). Next, he detailed the suffering of educators, laborers, and church workers at the hand of the current government in El Salvador (p. 60). Such severe repression made it necessary for citizens "to defend their own rights and those of their fellow citizens against the abuse of authority" (p. 66). He called the people of the church to organize into Christian and populist groups to express their dissent against the government.

February 17, 1980

"The Poor: Christ's Instrument of Liberation" applied the theory of liberation theology and outlined how Christians could respond to the evils of the national security system. Romero noted that "poverty is the strength of liberation" (p. 79), relating this conclusion to the beatitude--"the poor will inherit the earth" (MT. 5:2-4). After defining the role of the church in defense of the poor, he concluded that the political structures in El Salvador are sinful (p. 88). In order to fight this structural sin, Romero urged the people to organize politically but, in doing so, not to betray their faith (p. 93). He named the U.S. government as part of the national security system and read the letter he had written to President Carter protesting U.S. aid to El Salvador: "The contribution of your government will do nothing to support greater justice and peace in El Salvador. Without doubt, it will intensify injustice and the repression of the organized people who so many times have fought for their fundamental human rights" (p. 104). After pleading with

Carter to recognize the violations of human rights, Romero pointed out that "political power is in the hands of the unscrupulous military men who only know how to repress the people and favor the interests of the Salvadoran oligarchy" (p. 104). Romero believed that the national security system and the governments who supported it caused the repression and he urged people to express their dissent to the government.

March 23, 1980

Romero delivered the sermon, "The Church: Defender of Human Dignity," the day before his assassination. The sermon represented one of his strongest statements about human rights and his most severe condemnation of the military. He opened by expressing his fear that soon the church radio broadcasts would be shut down because the station acted as "an instrument of truth and justice." Then, he related the season of Lent to liberation saying: "God's words in Lent reveal his plan to free humanity completely" (p. 118). Next, he defended his preaching saying many had accused him of "forsaking the gospel for politics" but that he had tolowed the guidelines of Vatican II, Medellin, and Puebla (p. 118). He lamented the violence occurring in El Salvador, saying: "El Salvador is living its own exodus: today we are passing to our liberation through a desert strewn with bodies and where anguish and pain are devasting us" (p. 129). For this reason, he concluded, "the church must unite and not be divided in various political organizations" (pp. 132-136). After listing violations of the rights of speech, press, assembly, and legal justice (pp. 138-145), he noted that the week had been one of the most tragic in Salvadoran history and pleaded with the government to refrain from violence: "Do not kill! No soldier is obliged to obey an order against the law of God" (p. 161). He ended by pleading with the military: "I implore them. I beg them. I order them in the name of God, cease the repression" (p. 161). Instead the military killed the Archbishop the following day and later killed 40 of his mourners and wounded 450 who attended his funeral.

The sermons of Romero represent the statements of a church leader who valued free expression as both a component of a just society and the foundation of Christian teaching. This case study reveals the important role of liberation theology as a justification for human rights, suggests the strong opposition some church leaders have taken toward governments who violate rights, recognizes the importance of the sermon in mobilizing popular support for free expression, and raises questions about violations of civil liberties by national security systems which the U.S. government supports.

Romero's outspoken support of free expression mirrored what he believed to be the role for church leaders working as liberation theologians--to evangelize the people and to change their consciences so they would act against the government that oppressed them. Peerman observed that "the assassination . . . of Oscar Romero will not put a stop to his people's struggle for justice. . . . But unfortunately his death will not, in the short run, bring about the peace and reconciliation he so fervently sought."[60]

Endnotes

[1]June Carolyn Erlick, "Martyr Bishop Becomes 'St. Oscar' For Many," National Catholic Reporter, 17, 20 March 1981, p. 10.

[2]"Murder in the Chapel," Newsweek, 95, 7 April 1980, p. 47.

[3]Dean Peerman, "El Salvador's Fallen Hero," Christian Century, 17, 9 April 1980, p. 398.

[4]Ibid.

[5]Penny Lernoux, Cry of the People (New York: Penguin Books, 1980), p.76.

[6]"Voice of the voiceless" is a phrase that frequently appears in the

documents of liberation theology. The phrase is attributed to Dom Delder Camara, Bishop of Brazil.

[7]Max Echegaray, "Romero: Homilies for 'The Voiceless'," National Catholic Reporter, 16, 4 April 1980, p. 5.

[8]"The Church and Modern Latin America," in Between Honesty and Hope, trans. John Drury (Maryknoll, NY: Maryknoll Publications, 1969), pp. 29-30.

[9]Lernoux, Cry of the People, p. 62.

[10]Jose Comblin, The Church and the National Security State (New York: Orbis Books, 1979), p. 18.

[11]Report on Human Rights in El Salvador, ed. America's Watch Committee and the American Civil Liberties Union (New York: Vintage Books, 1980), introduction.

[12]Comblin, p. 94.

[13]El Salvador: Central America in the New Cold War, ed. Marvin E. Gettleman, et al. (New York: Grove Press, 1981), p. 2.

[14]Report on Human Rights in El Salvador, p. xxix.

[15]Patrick Lacefield, "Oscar Romero: Archbishop for the Poor," in Gettleman, pp. 198-203.

[16]Committee in Solidarity with the People of El Salvador, "El Salvador: A Political Chronology," in Gettleman, pp. 59-65. Other political background is offered in Lernoux, Cry of the People, pp. 61-80, and Placido Erdozain, Archbishop Romero: Martyr of Salvador. (Maryknoll, New York: Orbis Books, 1980).

[17]"The Sign of Resurrection in El Salvador," the document was developed by Caritas, an Archdiocesan group in El Salvador, reprinted in Gettleman, pp. 206-210.

[18]Comblin, p. 90.

[19]Ibid., p. 79.

[20]Frederick C. Turner, Catholicism and Political Development in Latin America (Chapel Hill: University of North Carolina Press, 1971), p. 3; Turner explains the church's role in politics in general. Lernoux, Cry of the Poor, specifies the political-church connections in El Salvador, pp. 61-80.

[21]Michael T. Klare and Cynthia Arnson, Supplying Repression: U.S. Support for Authoritarian Regimes Abroad (Washington, D.C.: Institute for Policy Studies, 1980).

[22]Comblin, p. 72.

[23]Report on Human Rights in El Salvador, p. 17.

[24]Ibid., pp. 119-120.

[25]Ibid.

[26]Several articles detail the atrocities in Gettleman and in Klare and Aronson.

[27]In several sermons, Archbishop Romero detailed this type of violence. See especially "The Church: Defender of Human Dignity" in A Martyr's Message of Hope (Kansas City: Celebration Books, 1981), pp. 139-147.

[28]Report on Human Rights in El Salvador, p. 120.

[29]U.S. Department of State, "Country Reports on Human Rights Practices for 1980" (Washington, February 1980), p. 318.

[30]Report on Human Rights in El Salvador, p. 137.

[31]Ibid., p. 135.

[32]Ibid., p. xxi.

[33]"Bishop Romero," Nation, 230, 5 April 1980, p. 385. The article established the link between the military and the death of Romero, although the government tried to blame his assassination on a right-wing guerilla.

[34]Peerman, p. 358.

[35]Current U.S. policy is detailed in "Communist Interference in El Salvador," The U.S. State Department White Paper, reprinted in Gettleman, pp. 230-242.

[36]"Congressmen Visit El Salvador," Associated Press, 25 June 1982.

[37]"Evangelization, Ideologies, and Politics," Sec. 507-562, in Puebla and Beyond, ed. John Eagleson and Philip Scharper, trans. John Drury (Maryknoll, N.W.: Orbis Books, 1979), pp. 194-202.

[38]Comblin, pp. 105-109. Principles of evangelization are outlined in "Mission of the Church," sec. 12.1-12.7) in Medellin Documents, Between Honesty and Hope, pp. 190-192, and elaborated in Puebla and Beyond, sec. 342-891, pp. 171-238.

[39]Penny Lernoux, in Alan Riding, "The Cross and the Sword in Latin America," in Gettleman, p. 193.

[40]Ibid.

[41]"Pastoral Conclusions," sec. 21, in Between Honesty and Hope, p. 298.

[42]"Politics," sec. 6, in Between Honesty and Hope, p. 178.

[43]Lernoux, "The Long Path to Puebla" in Puebla and Beyond, p. 17.

[44]Lernoux, in The Cry of the Poor, bases the entire book on this argument about Latin America politics.

[45]Jon Sobrina, "The Significance of Puebla for the Catholic Church," in Puebla and Beyond, pp. 295-298.

[46]"Pope John Paul II; Opening Address at the Puebla Conference," in Puebla and Beyond, p. 65.

[47]"Social Communication," sec. 1063-1095, in Puebla and Beyond, p. 256.

[48]Ibid.

[49]Comblin, p. 55

[50]Ibid., p. 107.

[51]"The Truth About Human Beings: Human Dignity," sec. 317-329, in Puebla and Beyond, pp. 167-170.

[52]"Evangelization, Liberation and Human Promotion," sec. 470-506, in

Puebla and Beyond, pp. 188-193.

[53]Erdozain, pp. 1-11.

[54]Ibid., pp. 21-40.

[55]Echegaray, p. 5.

[56]Erdozain, p. 33.

[57]A Martyr's Message of Hope, foreword, Moises Sandoval, p. 2.

[58]"Liturgy, Private Piety, and Popular Piety," sec. 930, in Puebla and Beyond, pp. 243.

[59]All of the sermons are taken from A Martyr's Message of Hope. Page references are given in the text.

[60]Peerman, pp. 398-399.

MOVEMENT ON THE PERIPHERY: FOREIGN TRAVEL AS A FIRST AMENDMENT RIGHT

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"This is a free country. Fella can go where he wants"
"That's what you think."

--John Steinbeck, The Grapes of Wrath

Introduction

A year after Steinbeck published that skeptical exchange Frank Duncan came to California not to express himself, but to look for work. The Depression had hit Spur, Texas, hard, and when Duncan's brother-in-law, Fred Edwards, offered to come from Marysville, California, and take him back there to work, Duncan went. But Steinbeck's words proved prophetic when a complaint was filed against Edwards under a state law prohibiting anyone from bringing "indigent" persons into California. Fred Edwards was convicted of a misdemeanor, and the conviction was ultimately appealed to the United States Supreme Court. Here Justice Byrnes spoke for a unanimous court, striking down the California statute as "an unconstitutional burden upon interstate commerce," and ruling accordingly that Edwards' "conviction under it cannot be sustained."[1]

For all practical purposes, Edwards v. California settled the question of whether U.S. citizens are free to move about within their own country, for any purposes other than escaping justice.[2] The more difficult issue, and the one about which Steinbeck's skepticism remains valid, focuses upon the extent to which government may limit American citizens' right to travel abroad, and whether such restrictions infringe constitutionally protected liberties, including freedom of expression. These issues came to head in the controversial case of Haig v. Agee in June of 1981, which ruled that the Secretary of State may revoke the passport of a person whose overseas activities "are causing or are likely to cause serious damage to the national security or foreign policy of the United States."[3] The noteworthy aspect of the ruling was that the respondent's foreign activities in this case consisted wholly of communication behavior--the public naming of CIA agents. This paper examines the history of Supreme Court litigation of the right to foreign travel in the attempt to explain the qualified nature of that right as it evolved on the "periphery" of the First Amendment in the cases preceeding the dubious ruling in Haig v. Agee.[4]

Statutory and Litigatory History

The recognition of foreign travel as a significant human liberty is found in the Anglo-American legal tradition at least since the Magna Carta of 1215. At Runnymede King John acquiesced to his Barons' demands that he no longer confine his political and religious enemies to the realm, and included Article 42 in the charter which stipulated that "In the future it shall be lawful for any man to leave out and return to our Kingdom unharmed and without fear, by land or water, preserving his allegiance to us, except in time of war, for some short period, for the common benefit of the realm."[5] The American colonists continued the tradition by including freedom of movement in the Articles of Confederation, Article IV of which provided in part that "the people of each state shall have free ingress and regress to and from any other state." Freedom of movement received endorsement from over fifty sovereign nations in 1948 with the promulgation by the United Nations of the Universal Declaration of Human Rights. Article 13 provided that "(1) Everyone has the right to freedom of movement within the borders of each State. (2) Everyone has the right to leave

any country, including his own, and return to his country." Article 14 further provided that "everyone has the right to seek and to enjoy in other countries asylum from persecution."

For centuries, as a means of helping secure the right of foreigh travel, sovereigns have issued passports to their citizens, and have expected other sovereigns to honor them. Historically, the purpose of passports in this country was thus to facilitate and expedite foreign travel, not to control it. Very early in its history, the Supreme Court endorsed the "safe passage" function of the passport, describing it as ". . . a document, which for its nature and object, is addressed to foreign powers; purporting only to be a request, that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document, by which the bearer is recognized, in foreign countries, as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact."[6] Beginning in the colonial period, it was common for state and local officials to issue passports for just such purposes, although they were not required for foreign travel. Chafee observes that during his upbringing, "To jump on a steamer in Boston and go to Liverpool was as easy as boarding the nightboat for New York."[7]

This dispersed passport authority lingered until 1856 when the first federal Passport Act was passed, primarily for the purpose of establishing the passport power exclusively at the federal level. Still, though, passports were not mandatory for foreign travel. The first instance of passports being required of persons came during the Civil War when Secretary of State Seward issued an order that "no person will be allowed to go abroad" or "to land in the United States" without holding a passport. Further, no one could cross Union Army lines without a passport.[8] This practice of Executive Branch limitations on foreign travel was continued by Theodore Roosevelt in 1903, and was followed in a number of Executive Orders in 1907 and 1917.[9]

The first congressional action specifically limiting the right of American citizens to travel abroad came in the Travel Control Act of 1918, which made it unlawful during time of war for an American citizen to "depart from or enter . . . the United States unless he bears a valid passport."[10] This was followed by the Passport Act of 1926, which provided that, "the Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States . . . under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports."[11] The 1926 Act provides the primary statutory authority for passport regulation. The interpretation of its language, which remains largely unchanged to the present, formed the central issue in Haig v. Agee.

Construction of the 1926 statute by the Executive Branch began two years after its enactment. A series of Executive Orders spanning nearly forty years construed the Act to authorize denials of passports on various national security grounds. In 1966 the Secretary of State expanded Executive Branch control over passports by promulgating a regulation authorizing revocation of the passport of any person whose activities "abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States."

The first major congressional action actually requiring passports as a condition of entering or leaving the United States came in Section 215 of the Immigration and Nationality Act of 1952.[12] This Act provided that after a required proclamation was issued by the President to the effect that a state of emergency existed, it would be "unlawful for any citizen of the United States to depart from or enter . . . the United States unless he bears a valid passport." In 1958 and 1966 bills were introduced in the House and Senate which would have expressly granted the Secretary of State the power to deny passports on national security grounds, but none were passed.[13] In 1978 Congress appeared to endorse the long-standing Executive Branch regulations by amending the Immigration and Nationality Act of 1952 to now require passports even in peacetime.[14]

After thirty years of near autonomy by the Executive Branch in the area of passport rules, the issue finally came before the Supreme Court. At the height of the Cold War the State Department began routinely refusing passports to Communist Party members, or those suspected of being "fellow travelers." Among those who were denied passports during this period were singer Paul Robeson, playwright Arthur Miller, screenwriter Carl Foreman, Dr. W.E.B. DuBois, and Dr. Linus Pauling, winner of the Nobel Prize in 1954.[15] Although numerous protests were lodged, the practice did not reach the Court until 1958 when two cases were joined in Kent v. Dulles.[16]

The two persons involved were Rockwell Kent, an artist, and Dr. Walter Briehl, a psychiatrist. Both had passports denied on the grounds that they were either members of the Communist Party, or had had "a consistent and prolonged adherence to the Communist Party line." The lower courts had sustained the passport denials, but the Supreme Court reversed by a narrow 5-4 vote. Several significant determinations came in Justice Douglas' majority opinion.

As a beginning premise, Justice Douglas found that the "right to travel is part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment." In dicta, Douglas seemed to imply constitutional bases for the right to travel in addition to the Due Process Clause, saying that it was "deeply engrained in our history," and that it "may be as close to the heart of the individual as what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values."[17] Having established that freedom of travel was constitutionally protected, the issue became not the extent to which it might be curtailed, but whether Congress had authorized its curtailment at all. Here Douglas ruled that while the Secretary of State did possess broad discretionary power to issue passports, the only two categories of persons who were traditionally refused were those not citizens of the United States, and those "participating in illegal conduct, trying to escape the toils of the law, promoting passport frauds, or otherwise engaging in conduct which would violate the laws of the United States." That being the case, Douglas argued, the Court declined "to impute to Congress, when in 1952 it made a passport necessary for foreign travel and left its issuance to the discretion of the Secretary of State, a purpose to give him unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose."[18]

Douglas argued next that although the original motivation for passports was the assurance of "safe passage," in modern times "that function of the passport is subordinate. Its crucial function today is control over exit. And, as we have seen, the right of exit is a personal right included within the word 'liberty' as used in the Fifth Amendment. If that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress." Citing a varied array of precedents, Douglas found that if such delegated powers tended to "curtail or dilute" individual freedoms, they would be narrowly construed. In the present case, he concluded, "We hesitate to find in this broad generalized power [to issue passports] an authority to trench so heavily on the rights of the citizen" by basing denials on one's political beliefs or associations.[19]

By so ruling, the majority opinion in Kent declined to reach the issue of the constitutionality of congressionally imposed travel restrictions--they found only that Congress had not delegated such powers to the Secretary of State.[20] Douglas' opinion was clear in its reminders that these particular passport denials had been based solely on petitioners' alleged membership in the Communist Party; "We deal with beliefs, with associations, with ideological matters. We must remember that we are dealing here with citizens who have neither been accused of crimes nor found guilty. They are being denied their freedom of movement solely because of their refusal to be subjected to inquiry into their beliefs and associations." If Congress had authorized passport denials on such ideological grounds, Douglas concluded, "we would be faced with important constitutional questions." The clear implication in Douglas' opinion was that such bases for passport denials for revocations would run afoul of the First Amendment. The Court was asked to face this issue squarely in the next significant passport case to come before them, but declined to do so.

In 1954 Congress passed the Communist Control Act[21] which, among other provisions, denied to the Communist Party any of the "rights, privileges, and immunities attendant upon legal bodies." Major portions of the Act were held to be constitutional in Communist Party v. Subversive Activities Control Board in 1961.[22] That holding gave virtual carte blanche to the passport authorities to withhold passports from Party members, which they did. In particular, passports were refused to Party Chairman Helen Gurley Flynn and Herbert Aptheker, editor of the Party's theoretical organ, Political Affairs. After exhausting all administrative remedies, the two brought suit for declaratory and injunctive relief in U.S. District Court for the District of Columbia. That court upheld the constitutionality of Section 6 of the Subversive Activities Control Act of 1950 which specifically made it a crime for any member of the Communist Party to either apply for or attempt to use a passport.[23] On appeal to the Supreme Court, the cases were heard as Aptheker v. Secretary of State.[24]

The appellants' brief in Aptheker attacked Section 6 on a variety of constitutional fronts, among which were the claims that it violated the Fifth Amendment's due process guarantees, and the First Amendment's freedoms of speech, press, and assembly.[25] Justice Goldberg's opinion for the Court limited its decision to Fifth Amendment grounds, but both he and other concurring justices raised significant First Amendment arguments on behalf of the appellants.

The government had argued in Aptheker that Section 6 was constitutional on its face, and as applied to these "top dignitaries" of the Communist Party. Justice Goldberg rejected both claims. He began by applying two standard tests of constitutionality: the doctrine of overbreadth and the doctrine of "less drastic means." After establishing the Congressional intent of the legislation to be protection of national security, Goldberg found Section 6 guilty of bringing within its reach "both knowing and unknowing members" of the Party, and of failing to distinguish members on the basis of their "degree of activity in the organization and their commitment to its purpose." These faults, he argued, caused the legislation to fail the "overbreadth" test. Since he also determined that the government had at its disposal "less drastic means" than prohibiting foreign travel for the protection of national security, Justice Goldberg ruled that Section 6 was "unconstitutional on its face" because it swept "too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment."

Justice Goldberg rejected the second claim, that the section was constitutional as applied, by pointing out that the intent of the provision was so clear that it would be "impossible to narrow its indiscriminately cast and overly broad scope without substantial rewriting." He thus concluded that "since freedom of travel is a constitutional liberty closely related to rights of free speech and association, we believe that appellants in this case should not be required to assume the burden of demonstrating that Congress could not have written a statute constitutionally prohibiting their travel."

Although First Amendment principles, per se did not decide Aptheker v. Secretary of State, a number of key arguments in that vein were raised here for the first time. Early in his majority opinion Goldberg had dismissed an argument the government seemed to be making that the appellants could "recapture their freedom to travel by simply in good faith abandoning. . . membership in the organization." This argument failed, he argued in dicta, because "Since freedom of association is itself guaranteed in the First Amendment, restrictions imposed upon the right to travel cannot be dismissed by asserting that the right to travel could be fully exercised if the individual would first yield up his membership in a given association."[26] In separate concurring opinions, Justices Black and Douglas made additional First Amendment arguments for a right to foreign travel.

Justice Black found merit in virtually all the constitutional arguments the appellants had raised (see Note 25, above), writing that "the whole Act, including Sect. 6, . . . violates the Federal Constitution." He argued that the Act specifically denied "appellants the freedom of speech, press, and

association which the First Amendment guarantees," and went on to elaborate: "This case offers another appropriate occasion to point out that the Framers thought (and I agree) that the best way to promote the internal security of our people is to protect their First Amendment freedoms of speech, press, religion and assembly, and that we cannot take away the liberty of groups whose views most people detest without jeopardizing the liberty of all others whose views, though popular today, may themselves be detested tomorrow."[27]

Justice Douglas also urged First Amendment arguments. Citing Kent v. Dulles and Edwards v. California, he pressed for broad rights of travel, both foreign and domestic, writing that "I would not suppose that a Communist, any more than an indigent, could be barred from traveling interstate. I think that a Communist, the same as anyone else, has this right. Being a Communist certainly is not a crime; and while traveling may increase the likelihood of illegal events happening, so does being alive." He went on to assert that, "Freedom of movement is kin to the right of assembly and to the right of association. These rights may not be abridged. . . . This freedom of movement is the very essence of our free society, setting us apart. Like the right of assembly and the right of association, it often makes all other rights meaningful--knowing, studying, arguing, exploring, conversing, observing, and even thinking. Once the right to travel is curtailed, all other rights suffer, . . ."[28]

Justice Tom Clark filed a dissent joined by Justices Harlan and White which argued that the denial of passports to Flynn and Aptheker was neither invalid on its face nor as applied. He stressed that while "the right to travel abroad is part of the liberty protected by the Fifth Amendment, the Due Process Clause does not prohibit reasonable regulation of life, liberty, or property. Here the restriction is reasonably related to the national security. . . . The right to travel is not absolute."[29] The only mention made of First Amendment issues in dissent was the assertion that this case turned exclusively on Fifth, not First, Amendment grounds. Apparently for that reason, the dissenters did not address any of the majority's First Amendment arguments.[30]

Despite its rhetorical appeal, Aptheker v. Secretary of State held only limited impact for the right to travel as a dimension of freedom of expression. Goldberg's majority opinion had argued that the right to travel was "closely related" to First Amendment rights, and Douglas' concurrence had continued the metaphor by suggesting that freedom of movement was "kin" to the rights of assembly and association. Nevertheless, any generalized right of foreign travel remained a poor relation. What the Court struck down in the Kent and Aptheker cases were only those aspects of government action which based passport denials or revocations on political associations and beliefs, and it did so exclusively upon Fifth Amendment due process grounds, rather than the comparatively stronger First Amendment principles it could have adopted. Moreover, subsequent Secretaries of State were to invoke passport denials and revocations based upon other grounds, most notably the prohibition of travel by any American citizen to particular places, and these "area restrictions" would be sustained.

On New Year's Day, 1959, Fidel Castro marched into Havana at the head of a band of triumphant guerrillas and proclaimed the Cuban Revolution a success. Just over two years later, On January 3, 1961, the United State broke formal diplomatic relations with Cuba and two weeks later the State Department announced that Castro's island would now be the only destination in the Western Hemisphere for which American citizens would be required to have a passport. They further invalidated all outstanding passports for travel to Cuba unless specifically endorsed for such travel by the Secretary of State.

In 1962, an American businessman, Louis Zemel, wrote to the State Department requesting that his passport be validated for travel to Cuba so that he might "satisfy his curiosity about the state of affairs in Cuba and to make him a better citizen."[31] His request was denied, and he filed suit in U.S. District Court in Connecticut. A three-judge court there dismissed his suit, and he appealed to the U.S. Supreme Court, which granted certiorari.[32]

Speaking through Chief Justice Earl Warren, the Court affirmed the area restriction by a vote of 6-3.

Mr. Zemel's case, argued by eminent constitutional lawyer Leonard B. Boudin, pressed a variety of claims, including the contention that the travel ban directly violated his First Amendment rights. In making this claim, Zemel became the first to press for a generalized right to travel as a dimension of freedom of expression. The Court thus addressed the issue head on but denied all of his constitutional pleas.

The passage most relevant to freedom of expression came mid-way through Chief Justice Warren's majority opinion. After noting that Zemel's request for travel to Cuba came only two months after the missile crisis of October, 1962, Warren invoked the criterion of "national security," what Professor Gregg Phifer has called "one of the god-terms of the contemporary era,"[33] to refuse his travel request:

> Appellant also asserts that the Secretary's refusal to validate his passport for travel to Cuba denies him rights guaranteed by the First Amendment. His claim is different from that which was raised in Kent v. Dulles . . . and Aptheker v. Secretary of State, . . . for the refusal to validate appellant's passport does not result from any expression or association on his part; appellant is not being forced to choose between membership in an organization and freedom to travel. Appellant's allegation is, rather, that the "travel ban is a direct interference with the First Amendment rights of citizens to travel abroad so that they might acquaint themselves at first hand with the effects abroad of our Government's policies, foreign and domestic, and with conditions abroad which might affect such policies." We must agree that the Secretary's refusal to validate passports for Cuba renders less than wholly free the flow of information concerning that country. While we further agree that this is a factor to be considered in determinging whether appellant has been denied due process of law, we cannot accept the contention of appellant that it is a First Amendment right which is involved. For to the extent that the Secretary's refusal to validate passports for Cuba acts as an inhibition (and it would be unrealistic to assume that it does not), it is an inhibition of action. There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information.[34]

Two voices can be heard in this passage, echoing two key tenets of First Amendment theory. First, and most importantly, is Thomas Emerson's "expression-action" dichotomy.[35] Even under the most liberal view of freedom of expression, conduct which can be distinguished from "pure expression" is not granted full protection of the First Amendment. Such behavior is classified as "action" and is entitled only to peripheral protection of the First Amendment, and such other safeguards as may be found in the Fifth and Fourteenth Amendments. The expression-action distinction would figure heavily in Haig v. Agee eighteen years following Zemel. Second, Chief Justice Earl Warren's hypothetical reference to a communicator seeking access to the White House is clearly the descendant of Justice Oliver Wendell Holmes, Jr.'s legendary man "falsely shouting fire in a theatre and causing a panic."[36] Both justices were basing their arguments on hypotheticals so extreme as to be beyond the reach of criticism. Such non-nullifiable examples fail to provide instruction in the intricacies of First

Amendment law and theory. Perhaps of more unfortunate impact, Chief Justice Warren's final sentence in the passage above gained watershed significance in all subsequent cases involving an alleged right of newsgathering.[37]

A significant issue in Chief Justice Warren's opinion in Zemel focused upon the question of whether Congress had properly delegated to the Executive Branch the power to restrict passports. Having found that the Passport Act of 1926 authorized area restrictions, Warren concluded that "the Act does not constitute an invalid delegation" of power.[38]

The three dissenters in Zemel v. Rusk took aim at the majority ruling from diverse constitutional positions. Justice Black led the attack, basing his critique in Article I of the Constitution which vests "All legislative powers. . . . in the Senate and house of Representatives." He argued that Congress simply lacked the power to delegate such broad rule-making power as area restrictions to the Executive Branch. He contended that: "For Congress to attempt to delegate such an undefined law-making power to the Secretary, the President, or both, makes applicable to this 1926 Act what Mr. Justice Cardozo said about the National Industrial Recovery Act: 'This is delegation running riot. No such plenitude of power is susceptible of transfer.' . . . I do not think our Constitution intended that this vital legislative function could be farmed out in large blocks to any governmental official."[39]

Justice Douglas, with Justice Goldberg concurring, posted a lengthy dissent which pressed vigorously for a First Amendment right to travel. However, even the liberal Justice Douglas took a qualified position on this claim. His dissent offers a concise explanation of both his view of the issue, and the constitutional status of the right to foreign travel at the time.

> We held in Kent v. Dulles . . . that the right to travel overseas, as well as at home, was part of the citizen's liberty under the Fifth Amendment. That conclusion was not an esoteric one drawn from the blue. It reflected a judgment as to the peripheral rights of the citizen under the First Amendment. The right to know, to converse with others, to consult with them, to observe social, physical, political and other phenomena abroad as well as at home give meaning and substance to freedom of expression and freedom of the press. Without those contacts First Amendment rights suffer. That is why in Kent v. Dulles . . . we said that freedom of movement has "large social values."

Having thus laid his constitutional foundation, Douglas went on to elaborate his argument in a lengthy dictum:

> I agree that there are areas to which Congress can restrict or ban travel. Pestilences may rage in a region making it necessary to protect not only the traveler but those he might infect on his return. A theatre of war may be too dangerous for travel. Other like situations can be put. But the only so-called danger present here is the Communist regime in Cuba. The world, however, is filled with Communist thought; and Communist regimes are on more than one continent. They are part of the world spectrum; and if we are to know them and understand them, we must mingle with them, as Pope John said. Keeping alive intellectual intercourse between opposing groups has always been important and perhaps was never more important than now.
>
> The First Amendment presupposes a mature people, not afraid of ideas. The First Amendment leaves no room for the official, whether truculent or benign, to say nay or yea because the ideas offend or please him or because he believes some political objective is served by keeping the citizen at

> home or letting him go. Yet that is just what the Court's decision today allows to happen . . . .

Douglas concluded his dissent with a key paragraph which captures the essential dimension of First Amendment theory relevant to the law of foreign travel--the expression-action dichotomy: "As I have said, the right to travel is at the periphery of the First Amendment, rather than at its core, largely because travel is, of course, more than speech: it is speech brigaded with conduct. Restrictions on the right to travel in times of peace should be so particularized that a First Amendment right is not precluded unless some clear countervailing national interest stands in the way of its assertion."[40]

Justice Goldberg filed a lengthy separate dissent in which he carefully analyzed the legislative and administrative history of the Passport Act, concluding that,

> . . . it is clear that Congress did not mean the 1926 Act to authorize the Executive to impose area restrictions in time of peace, and with all deference, I disagree with the Court's holding that it did. I agree with the Court that Congress may authorize the imposition of travel restrictions consistent with constitutional guarantees, but I find it plain and evident that Congress has never considered and and resolved the problem.
>
> In view of . . . the importance and constitutional underpinnings of the right of citizens and a free press to gather information about foreign countries--considerations which Congress did not focus upon--I would not infer, as the Court does, that Congress resolved the complex problem of area restrictions, . . .[41]

The Court's six-man majority remained unconvinced by the dissenters' arguments, and sustained the area restrictions.

Over fifteen years passed before the issue of foreign travel as a dimension of freedom of expression came again to the Supreme Court. Justice Goldberg had resigned, and Black and Douglas were dead. It was thus the "Nixon Court" which heard Haig v. Agee argued on January 14, 1981. This case marks the current status of case law in the area of foreign travel.

Whatever else he was guilty of, Philip Agee was by no means guilty of understatement when he held a 1974 London press conference declaring his intent "to expose CIA officers and agents and to take the measures necessary to drive them out of the countries where they are operating." A year later he published Inside the Company: CIA Diary which detailed his twelve years as an active agent and in which he revealed the names of hundreds of "employees, agents, liaison contacts," and organizations which were "used by or involved with the CIA or its operations."[42] These revelations were made, Agee wrote, in order to "illuminate a whole dark world of foreign Watergates covering the past thirty years" of the CIA's history. He announced that his future tactic would be to travel to various foreign countries, establish contacts with sympathetic sources there, and systematically expose CIA operatives all over the world. According to evidence offered later by the Department of State, Agee enjoyed remarkable success in his campaign: "In December 1975, Richard Welch was murdered in Greece after the publication of an article in an English-language newspaper in Athens naming Welch as CIA Chief of Station . . . In July 1980, two days after a Jamaica press conference at which Agee's principal collaborator identified Richard Kinsman as CIA Chief of Station in Jamaica, Kinsman's house was strafed with automatic gunfire . . . In January 1981, two American officials of the American Institute for Free Labor Development, previously identified as a CIA front by Agee and discussed extensively in Agee's book Inside the Company: CIA Diary, were assassinated in El Salvador."[43]

On November 4, 1979, a group of revolutionary Islamic "students" seized the American embassy in Teheran, taking fifty-four Americans captive, some of whom were alleged to be CIA operatives. From his home in West Germany, Philip Agee responded by suggesting to the captors which CIA documents to demand, and offered to come to Iran to assist in their analysis. These actions were apparently sufficient to cause the State Department to stop perceiving Agee as merely a more than normally troublesome gadfly, and Secretary of State Cyrus Vance immediately revoked his passport. The Secretary's notice sent to Agee informed him that "your activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States."

Agee made no attempt to avail himself of administrative remedies, but instead filed suit in U.S. District Court.[44] His primary argument was that the Secretary had never been authorized by Congress to revoke passports. This was coupled with various Fifth and First Amendment claims. The District court agreed with Agee, ruling that the Secretary's action exceeded his statutory authority under the Passport Act of 1926.. The Court of Appeals, by a divided vote, affirmed the District Court's ruling.[45] The government appealed, and on certiorari the case came to the Supreme Court as Haig v. Agee, as a new Secretary of State had assumed office.

The principal question addressed by the Court was whether Congress, through the Passport Act of 1926, had authorized the Secretary of State to revoke passports. A 7-2 majority ruled that it had. Chief Justice Warren Burger's opinion for the Court offered an exhaustive legislative and administrative history leading to the conclusion that the 1926 "Passport Act does not in so many words confer upon the Secretary a power to revoke a passport. Nor, for that matter, does it expressly authorize denials of passport applications. Neither, however, does any statute expressly limit those powers."[46] The Chief Justice, however, along with his fellow "strict constructionists," was unimpressed by this absence of specific congressional authorization. When several decades of administrative practice by the Executive Branch were combined with the fact that Congress had, in 1978, amended the Act to require passports for departure from and entry into the country in peacetime, the majority found "weighty evidence of congressional approval of the Secretary's" actions. They accordingly disposed of Agee's initial argument, and turned to his constitutional claims.

Chief Justice Burger noted that Agee attacked the passport revocation on three constitutional grounds: ". . . that the revocation of his passport impermissibly burdens his freedom to travel; second, that the action was intended to penalize his exercise of free speech and deter his criticism of Government policies and practices; and third, that failure to accord him a pre-revocation hearing violated his Fifth Amendment right to procedural due process." Burger began refutation of Agee's claims by invoking the precedent of Califano v. Aznavorian which had established that "the 'right' of international travel has been considered to be no more than an aspect of the 'liberty' protected by the Due Process Clause of the Fifth Amendment. As such this 'right,'. . . can be regulated within the bounds of due process."[47] If Phifer thought "national security" was a "god-term," Burger raised it to the level of of a Kelsonian "grundnorm," [48] writing that is "is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." That having been said, it followed naturally that none of Agee's constitutional claims could survive. Burger did, however, give special attention to his First Amendment arguments, but dealt them a fatal dual blow, rejecting them first on the basis of content, and second on the strength of the expression-action dichotomy:

> Assuming, arguendo, that First Amendment protections reach beyond our national boundaries, Agee's First Amendment claim has no foundation. The revocation of Agee's passport rests in part on the content of his speech: specifically, his repeated disclosures of intelligence

> operations and names of intelligence personnel. Long ago, however, this Court recognized that "no one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." Near v. Minnesota ex rel. Olson, 283 U.S. 697, 716 (1931), citing Z. Chafee, Freedom of Speech 10 (1920). Agee's disclosures, among other things, have the declared purpose of obstructing intelligence operations and the recruiting of intelligence personnel. They are clearly not protected by the Constitution. The mere fact that Agee is also engaged in criticism of the Government does not render his conduct beyond the reach of the law.
>
> To the extent that the revocation of his passport operates to inhibit Agee, "it is an inhibition of action," rather than of speech. Zemel, 381 U.S., at 16-17. . . . Agee is as free to criticize the United States Government as he was when he held a passport--always subject of course, to express limits on certain rights by virtue of his contract with the Government.[49]

Justice Blackmun filed a brief concurring opinion, noting that from all appearances the majority had partially overruled the precedents of Zemel v. Rusk and Kent v. Dulles, but had done so "sub silentio." He would have preferred for the Court to "disavow forthrightly the aspects of Zemel and Kent that may suggest" that administrative practices were not sufficient bases for inferring congressional approval. The Court's two surviving "liberals," Brennan and Marshall, were the only dissenters.

Justice Brennan's opinion, joined by Justice Marshall, proceeded primarily on technical grounds involving whether or not the legislative and administrative histories of the Passport Act had, in fact, evolved into the power of revocation the majority opinion granted to the Secretary of State. But Brennan posted some reservations on the First Amendment dimensions of the case as well:

> I suspect that this case is a prime example of the adage that "bad facts make bad law." Philip Agee is hardly a model representative of our Nation. And the Executive Branch has attempted to use one of the only means at its disposal, revocation of a passport, to stop respondent's damaging statements. But just as the Constitution protects both popular and unpopular speech, it likewise protects both popular and unpopular travelers. And it is important to remember that this decision applies not only to Philip Agee, whose activities could be perceived as harming the national security, but also to other citizens who may merely disagree with Government foreign policy and express their views.[50]

In a concluding footnote, Justice Brennan bitterly attacked what he characterized as "the Court's whirlwind treatment of Agee's constitutional claims." In response to the majority's reliance upon the expression-action dichotomy to justify curtailing Agee's activities, Brennan hypothesized that, "under the Court's rationale, I would suppose that a 40-year prison sentence imposed upon a person who criticized the Government's food stamp policy would represent only an inhibition of action. After all, the individual would remain free to criticize the United States Government, albeit from a jail cell." To the Court's claim that the content of Agee's speech was "clearly not protected by the Constitution," Brennan replied,

> The Court seems to misunderstand the prior precedents of this Court, for Agee's speech is undoubtedly protected by the Constitution. However, it may be that respondent's First Amendment right to speak is outweighed by the

> Government's interest in national security. The point respondent makes, and one that is worthy of plenary consideration, is that revocation of his passport obviously does implicate First Amendment rights by chilling his right to speak, and therefore the Court's responsibility must be to balance that infringement against the asserted governmental interests to determine whether the revocation contravenes the First Amendment. I add that Near v. Minnesota . . . is hardly a relevant or convincing precedent to sustain the Secretary's action here. Only when there is proof that the activity "must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea" does the Near exception apply.[51]

Reactions to the Agee Case: Popular, Scholarly, and Congressional

Reactions to the Agee case in the popular press were swift and varied. Conservative columnist George Will rejoiced in the Court's decision, calling Agee "a soiled bit of flotsam from the 1960's" who was attempting to turn the cry of "Free Speech!" into a "refuge of scoundrels." Characterizing Agee's First Amendment arguments as "impudent," Will took particular pleasure in the content-based aspects of the Court's ruling.[52]

University of Michigan law professor Yale Kamisar, writing in the New York Times, echoed Will's ad hominem attack, noting that there "is no reason to shed tears for Philip Agee." Professor Kamisar's view of the ruling, however, was somewhat more guarded. He found particular fault with the Court's reliance upon the expression-action distinction. Implying a group of related precedents, Kamisar added that he did "not believe travel abroad, any more than public employment or the practice of a profession, may be conditioned upon the surrender of First Amendment rights that could not be abridged by direct government action." Kamisar did, however, agree with Will that the actual content of Agee's speech was abridgable, but he would have preferred for the government to do so directly, such as by enacting a statute "making it a crime to disclose the identities of CIA agents."[53] Within a year Kamisar would have his way.

While Nathan Lewin downplayed the scope of the Agee decision in his New Republic editorial, he did believe that the Supreme Court deserved "the lumps it is taking on account" of the case. Lewin argued that although the State Department probably could permissibly prevent Agee's trip to Iran, they went beyond constitutional boundaries in stopping all his travel. This action, he wrote, "demeans a fundamental freedom which has been recognized in historic declarations from the Magna Carta to the United Nations' Universal Declaration of Human Rights." Again registering personal contempt for Philip Agee, Lewin concluded that "seven Justices, without seeming to swallow hard, have now relegated international travel to the back of the constitutional bus. It may take a more palatable traveler to inch it forward."[54]

With characteristic aplomb, Agee himself responded to the Court's decision by writing in the New York Times that "having no passport changes nothing substantial for me." He lambasted the decision on various grounds, and promised that "people will soon see what an American can do to oppose official policy without a passport, and outside the country." He pledged to show up the government's explanation of its actions in El Salvador as "pure bunk--another Government lie to justify intervention against a third-world liberation movement."[55]

Scholarly viewpoints on freedom of international travel, and the impact of the Agee decision upon it, were as varied as popular commentary. Twenty-five years before Philip Agee began his anti-CIA campaign, Professor Zechariah Chafeee took a position which apparently would have come down on the side of the government in his case. While arguing forcefully for a generalized right to foreign travel, Chafee provided some notable exceptions. In discussing the rights of Americans to leave the country, Chafee seemed to endorse the McCarran Act's

prohibition of issuing passports to Communists, and he further indicated personal reservations about allowing "plainly dangerous travelers" to leave the country. Regarding the admission of foreign travelers into this country, Chafee took the somewhat xenophobic position that if people want to come here, "they ought not to differ very much from the mass of Americans."[56]

While Thomas Emerson would, no doubt, condemn the Agee decision to the extent that it was based on the content of expression, he had specifically endorsed the view that travel should properly be considered "action." Writing in 1970 he concluded that travel between countries "would probably have to be classified as 'action' rather than 'expression.'"[57] This classification led Emerson to the same Meiklejohn-like position that the primary constitutional protection for the communication dimensions of travel would have to be found in the Fifth Amendment's due process clause rather than in the absolute language of the First Amendment.

Several law reviews responded specifically to the Agee decision, the most comprehensive of which was Thomas E. Laursen's article in the Columbia Law Review of 1981 entitled "Constitutional Protection of Foreign Travel." Laursen inquired whether "the courts should treat travel abroad as a distinct constitutional right," and concluded that "such a right cannot legitimately be derived from the Constitution." He joined the view, however, that travel was peripherally protected by the First Amendment, noting that "the Constitution's concern for free expression does dictate the invalidation of travel restrictions that impermissibly burden free speech." Laursen pointed out the various content-based restrictions the Court has sustained over the years (e.g., obscenity, "fighting words," incitement to unlawful action, etc.), and observed accordingly that, "a statute or regulation prohibiting citizens from travelling because of communication they intend to undertake abroad or because of their speech or associations within the United States would trigger the 'unprotected messages' test: unless limited to 'unprotected messages,' such restrictions would be 'absolutely' impermissible." He went on to note that Agee's passport had been revoked on "precisely this ground."[58]

After a lengthy analysis of the statutory, administrative, litigatory, and philosophical dimensions of the right of foreign travel, Laursen concluded that the Supreme Court's ruling in Haig v. Agee "was basically correct." He wrote:

> The revocation was based on the content of Agee's speech and was therefore subject to the "unprotected messages" test. To the extent that Agee's disclosures of CIA operations and agents went well beyond mere criticism of CIA policies and actions and were in a specific way violative of a government interest equivalent to the prevention of espionage against the United States, the Court correctly found them to fall within an unprotected category of speech. Because such speech is unprotected, the government was entitled to revoke Agee's passport to prevent further disclosures. Had Agee limited his speech to criticism, however vehement, of CIA policies and activities, the first amendment would have absolutely prohibited the government from basing the revocation of his passport on the content of his expression.[59]

The Harvard Law Review continued the by now familiar personal disdain for Agee, noting that it "is hard to imagine a citizen less likely to evoke the sympathies of the Court than Philip Agee." Their Note went on, however, to register basic concerns about the wisdom of the decision. The Note shared the reservations of Kamisar and Lewin, and added that such prospects of unbridled executive branch discretion in passport matters "are particularly troubling in light of the capricious manner in which passports have been denied or revoked in the past."[60] The authors concluded by coming to a position similar to Justice Brennan's "bad facts make bad law" statement:

> . . . the independent significance of the right to

> travel may yet survive Agee. Despite the Court's expansive language, the best reading of the case is an extraordinary response to an extraordinary set of facts. The right to travel in order to expose agents and thereby endanger their lives may be unprotected travel, much as speech that incites imminent violence is unprotected under the "clear and present danger" doctrine of Brandenburg v. Ohio. The government should therefore be allowed to infringe Agee's right to travel in order to further its compelling need to protect the lives of intelligence agents abroad. But such a holding clearly leaves in question the constitutionality of further government efforts to restrict the right to travel in less extreme situations and by means of a less carefully drafted regulation.[61]

Writing in the Fordham Law Review, Evelyn Capassakis analyzed Haig vs. Agee from statutory and due process perspectives, not touching upon First Amendment issues, per se, and concluded that the Passport Act did, in fact, delegate revocation power to the Secretary of State, and that such powers did not "violate the procedural and substantive due process rights of travelers abroad who threaten the nation's safety or foreign relations."[62]

The popular and scholarly reactions to the Agee case were followed by congressional reaction in the form of legislation specifically outlawing the identification of intelligence operatives. The Senate Report on its version of the bill, S. 391, left no doubt as to whose activities motivated their deliberations: "A small group of Americans, including former intelligence agency employees, have been engaged in a systematic effort to destroy the ability of our intelligence agencies to operate clandestinely by disclosing the names of intelligence agents.

"Foremost among them has been Philip Agee . . . ."[63] Both houses of Congress overwhelmingly passed the legislation, which became Public Law 97-200, known as the "Intelligence Identities Protection Act of 1982." It provides for fines up to $50,000 and jail terms up to ten years, or both, for persons identifying covert agents. Ironically, no mention is made of passports in the Act, but Sect. 604 provides for "extraterritorial jurisdiction" in the case of American citizens violating its provisions outside the United States.

President Reagan signed the legislation on June 23, 1982 at a public ceremony held at CIA headquarters in Langley, Virginia. Although never mentioning Philip Agee by name, the President referred to him obliquely as he said: "The Congress has carefully drafted this bill so that it focuses only on those who would transgress the bounds of decency; not those who would exercise their legitimate right of dissent. This carefully drawn act recognizes that the revelation of the names of secret agents adds nothing to legitimate public debate over intelligence policy."[64]

The courts have not yet had opportunity to scrutinize the Intelligence Identities Protection Act, but reservations about its constitutionality were quickly forthcoming. The American Civil Liberties union, which had lobbied against the Act, responded the week following its signing that they believed "the legislation is unconstitutional," and were "preparing to challenge it in court if and when an appropriate case arises."[65] The Reporters' Committee on Freedom of the Press expressed concern that under the Act "journalists could be fined or jailed for reporting on spy agency illegalities," and further noted that for "prosecution purposes it would not matter whether the information identifying the agent was obtained from public or secret sources."[66] In an apparent attempt to educate and prepare future potential litigants, the Reporters' Committee pointed out some significant aspects of the legislative history of the Act:

> The fact that reporters legitimately covering news involving the CIA or FBI would be subject to such criminal

> sanctions for "naming names" stirred a response of outrage from the press. In response, the House and Senate conferees attempted to build in some legislative history to the Act which, if followed by the courts, would nearly exempt the press from criminal liability under the Act.
>
> Thus, the conference report specifically states that section 601(c) of the Act "does not affect the First Amendment rights of those who disclose the identities of agents as an integral part of another enterprise such as news media reporting of intelligence failures or abuses, academic studies of U.S. government policies and programs, or a private organization's enforcement of its internal rules. . . ."
>
> Although the conference report does not supersede the Intelligence Identities Act in legal force, it is an authoritative aid used by the courts in interpreting the law.[67]

Reacting to early versions of the Act, the Human Rights Internet Reporter compared it to the British Official Secrets Act and questioned whether it could ever be "squared with First Amendment principles as the Supreme Court has developed them since 1925." The dangers they saw included the possibility that a "journalist, a defense attorney in a political trial, even an American historian digging into the recent past would have a difficult time establishing the facts credibly without simultaneously publicizing information identifying some person (not necessarily by proper name) within the protected ambit of the vague specifications of this legislation."[68]

Conclusion

In summary, several generalizations can be made. In regard to the state of the law governing travel, we can say first that domestic travel for any legal purposes, including expression, is "virtually unqualified." Second, to the extent that a restriction on foreign travel is based on political beliefs or affiliations, it is invalid under the First and Fifth Amendments. Third, the government does possess the authority to proscribe travel by all Americans to particular places. It remains questionable whether persons may be criminally prosecuted for violating such "area restrictions." Although United States v. Laub teaches that they may not (see Note #38 above), federal legislation since that case may authorize such prosecutions. The Carter Administration, for example, threatened to prosecute former Attorney General Ramsey Clark and others for their violation of the President's travel ban to Iran,[69] relying for statutory authority on the International Economic Emergency Powers Act, enacted in 1977. Since the Carter Justice Department later declined to initiate the prosecutions against Clark and his associates,[70] the validity of such actions under the Laub precedent is not known. Fourth, Haig v. Agee settles the issue of whether a generalized right to foreign travel as a dimension of freedom of expression exists--it does not. The Court ruled that by virtue of long-standing administrative practices, Congress had delegated to the Executive Branch the power to revoke the passports of people whose overseas activities pose threats to American national security or foreign policy, even if such activities consist exclusively of communication behavior. And fifth, all justices and commentators have agreed that to the extent that the First Amendment protects a right to travel, it does so only at "the periphery," not at the "core." This "peripheral" status of the right to travel triggers the theory noted by Professor Alexander Meiklejohn that some forms of expression are properly covered by the Fifth Amendment's "due process" clause instead of the absolute language of the First Amendment, and as such, may be abridged so long as "due process of law" is observed.

The prognosis based on these generalizations is not good. In oral argument in Haig v. Agee Solicitor General Wade H. McCree, Jr. was asked by one of the justices whether the government's interpretation of the 1926 Passport Act would sanction the denial of a passport to an American citizen who intended to travel to El Salvador for the purpose of "denouncing the United States

policy . . . in supporting the junta." The Solicitor General replied flatly, "I would say, yes, he can. Because the President and the Secretary of State working under him are charged with conducting the foreign policy of the Nation, and the freedom of speech that we enjoy domestically may be different from that we can exercise in this context."[71] In other words, messages that may enjoy full protection of the First Amendment if spoken at home may be forbidden abroad. This constitutional Catch 22 leaves the communicator in the dilemma of choosing between foregoing foreign travel and confining the intended expression to our shores, or leaving the country without a passport and risking criminal prosection upon return. The legislation which grew out of such a dilemma, the Intelligence Identities Protection Act of 1982, while actually doing nothing to curtail foreign travel, per se, apparently claims the authority to stifle previously protected communication produced domestically by legitimate news sources or academicians. The state of the law thus seems to be, to paraphrase Steinbeck, "fella can't always go where he wants to go, and he can't always say what he wants to say."

Endnotes

[1]Edwards v. California, 314 U.S. 160 (1941).

[2]While most authorities agree that Edwards remains the leading case on interstate travel, it was neither the first nor the last. Boudin notes that the issue originated with the so-called "Passenger Cases" in 1849, Smith v. Turner, 48 U.S. (7 How.) 282 (1849), in which passenger taxes on aliens arriving in New York and Massachusetts were declared invalid. See Leonard B. Boudin, "The Right to Travel," in The Rights of Americans, ed. Norman Dorsen (New York: Pantheon Books, Random House, 1970, 1971), pp. 381-398. In 1867 the Supreme Court struck down Nevada's one dollar per person exit tax both as violative of the Commerce Clause and as a hindrance to the implicit right of citizens to leave their state to travel to the national capitol. See Crandall v. Nevada, 6 Wallace (U.S.) 35 (1867). In United States v. Wheeler, 254 U.S. 281 (1920), the Court held that states could constitutionally deport people from their borders by force. Perhaps the most notable and unsavory episode in the law of interstate travel involved the forcible detention of Americans of Japanese ancestry during World War II. The constitutionality of the detainment camps was sustained in Korematsu v. United States, 323 U.S. 214 (1941) with Justices Black and Douglas concurring. More recently, the Court reinstated a murder indictment in a civil rights case on the authority of the equal protection clause of the 14th Amendment, asserting that the "constitutional right of interstate travel is virtually unqualified." United States v. Guest, 383 U.S. 755 (1966). Capassakis notes that "United States citizens have the right to pass through every part of the country unhindered by statutes, rules or regulations that unreasonably burden or restrict travel." Evelyn Capassakis, "Passport Revocations or Denials on the Ground of National Security and Foreign Policy," Fordham Law Review 49, #6 (May, 1981), pp. 1193-1194. See also, Oregon v. Mitchell, 400 U.S. 112 at 237 (1970), Justices Brennan, White, and Marshall, dissenting, who argue, "We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States." This notion of "national" citizenship forms a central tenet of the right of domestic travel.

[3]Haig v. Agee, 453 U.S. 280 (1981).

[4]Chafee identifies four aspects of freedom of movement: (1) mobility within the United States; (2) freedom to leave the country; (3) freedom to enter the country; and (4) freedom from exile. See Zechariah Chafee, Jr., Three Human Rights in the Constitution (Lawrence: The University of Kansas Press, 1956), pp. 187-213. The present study addresses only the second of these aspects. Other dimensions of the law of travel not treated here relate to regulation of the travel industry (See Alexander Anolik, The Law and the Travel Industry (Corte Maderia, California: Alchemy Books, 1977), or the various regulations governing aliens' rights and privileges. See generally, David Carliner, The Rights of Aliens: The Basic ACLU Guide to An Alien's

Rights (New York: Discus Books, Avon Books for the American Civil Liberties Union, 1977). For the most recent changes in the law affecting aliens, see S. 2222, "Immigration Reform and Control Act of 1982," passed by the Senate on August 17, 1982. See also Shapiro v. Thompson, 394 U.S. 618 (1969) striking down durational residency requirements for welfare benefits, and Califano v. Aznavorian, 439 U.S. 170 (1978) which ruled that state residency requirements for welfare benefits did not infringe the right of international travel.

A closely related aspect of the right to travel focuses upon the extent to which foreign citizens are free to enter this country for purposes of communicating with Americans. In Kleindienst v. Mandel, 408 U.S. 753 (1972), the Court took the position that while the American scholars who wished to hear Dr. Mandel, a Belgian Marxist, did in fact have a First Amendment interest in receiving communication, Mandel had no First Amendment right to enter the country, that being a matter for the political branches to decide. Justice Marshall's dissent evinced an admirable sensitivity to communication processes when he argued that the "freedom to speak and the freedom to hear are inseparable. . . . The activity of speakers becoming listeners and listeners becoming speakers is essential in the vital interchange of thought."

Relying on the same philosophy of judicial deference to the political branches, a federal court in New York very recently declined to intervene in the Reagan Administration's denial of visas to a group of Japanese anti-nuclear activists wishing to participate in a disarmament rally in Central Park. Responding to a suit by the ACLU, the court said it had "no power to inquire into the wisdom or basis of the government reason" for refusing the visas. See Civil Liberties, July 1982, p. 1. For an account of an earlier episode of governmental refusal to admit foreign communicators, see "American Visa Policy and Foreign Scientists," Bulletin of the Atomic Scientists 209 (October, 1952). Notable among those refused admittance to the United States during this period were Pablo Picasso and Rev. Hewlett Johnson, Dean of Canterbury Cathedral. See New York Times, March 4, 1950. For an account of the Carter Administration's efforts to restrict the foreign travel of both American and Soviet scientists, see, Daniel Ross Chandler, "International Exchange of Scientific Information During Crisis: A Case Study in the Right to Communicate," in Free Speech Yearbook 1980, ed. Peter E. Kane (Annandale, Virginia: Speech Communication Association, 1981), pp. 58-66.

[5]Felons, citizens of states at war with England, and merchants were excepted from this "safe passage" article. Moreover, the entire article was omitted from Henry III's issue of the charter in 1225, which remained the only version available to the public until Sir William Blackstone's scholarly edition of The Great Charter and the Charter of the Forest was published in 1759. See Louis B. Wright, Magna Carta and the Tradition of Liberty (Washington, D.C.: The U.S. Capitol Historical Society and the Supreme Court Historical Society, 1976), pp. 56, 39. See also the exhaustive bibliographical survey found in note #67 of Thomas E. Laursen's "Constitutional Protection of Foreign Travel," Columbia Law Review 81 (1981), pp. 915-916.

[6]Urtetiqui v. D'Arcy, 34 U.S. (9 Pet.) 692 at 698 (1835).

[7]Chafee, p. 193. See also, The American Passport (Washington, D.C.: Department of State, 1898.)

[8]Quoted in Boudin, p. 383.

[9]For a survey of these orders, see Chief Justice Burger's majority opinion in Haig v. Agee, 453 U.S. 280 at 295-296.

[10]40 Stat. 559.

[11]22 U.S.C., Sec. 211a (1976 ed., Supp. III).

[12]66 Stat. 190, 8 U.S.C. Sect. 1185.

[13]See, e.g., S. 2770, 85th Cong., 2nd Session (1958); S. 4110 85th Cong., 2nd Session, (1958); H.R. 13760, 85th Cong., 2nd Session, (1958); S. 3243, 89th Cong., (1966); and H.R. 14895, 89th Cong., 2nd Session, (1966).

[14]Act of October 7, 1978, Sect. 707(b), 92 Stat. 993. Congress simultaneously amended the Passport Act of 1926 to prohibit geographical restrictions on passports in "the absence of war, armed hostilities, or imminent danger to travelers." Ibid., Sect. 124, at 971. Chief Justice Burger's majority opinion in Haig v. Agee viewed these amendments as "weighty evidence" of Congressional approval of passport revocations by the Executive Branch.

[15]Thomas Emerson, David Haber, and Norman Dorsen, Political and Civil Rights in the United States I, Student Edition (Boston: Little, Brown and Company, 1967), pp. 917-918. See generally, Ibid., pp. 908-947.

[16]357 U.S. 116 (1958). A third case, Dayton v. Dulles, 357 U.S. 144 (1958), was decided on similar grounds the same day.

[17]357 U.S. at 126. (Emphasis "supplied")

[18]357 U.S. at 127-128.

[19]357 U.S. at 129.

[20]Douglas noted the fact that the relevant legislation adopted by Congress "curtailing the movement of Communists across our borders has not yet become effective." 357 U.S. 116, at 130.

[21]68 Stat. 775 (1954); 50 U.S.C. Sections 841-844.

[22]367 U.S. 1 (1961).

[23]64 Stat. 993; 50 U.S.C. Sect. 785.

[24]378 U.S. 500, (1964).

[25]They further argued that the provision was a bill of attainder in violation of Article I, Section 9, that it infringed right to trial by jury, and that it constituted cruel and unusual punishment as prohibited by the Eighth Amendment.

[26]378 U.S. 500, at 507.

[27]378 U.S. 500 at 518-519.

[28]378 U.S. 500, at 519-520.

[29]378 U.S. 500, at 525-526.

[30]The scholar best known for advancing the constitutional theory which draws distinctions between the kinds of freedoms protected by the First and Fifth Amendments is Alexander Meiklejohn. His "two freedoms" argument posits that the First Amendment erects absolute barriers to government interference, while the Fifth Amendment erects only conditional barriers, which the government can surmount provided "due process of law" is observed. See Alexander Meiklejohn, Free Speech and Its Relation to Self-Government (New York: Harper & Brothers, 1948).

[31]Quoted in Zemel v. Rusk, 381 U.S. 1 (1965).

[32]In 1959 and 1963, three separate suits were filed in the U.S. Court of Appeals for the District of Columbia seeking passports, cumulatively, for travel to China, Korea, Vietnam, and Hungary. Two cases, Frank v. Herter, 269 F.2d 245 (D.C. Cir. 1959) and Worthy v. Herter, 270 F.2d 905 (D.C. Cir.

1959), involved newspaper reporters, and the third, Porter v. Herter, 278 F.2d 280 (D.C. Cir. 1960), involved U.S. Congressman Charles O. Porter. The Supreme Court denied certiorari in all three cases.

[33]Gregg Phifer, "H-Bomb "Secrets" and the Progressive," in Free Speech Yearbook 1980, ed. Peter E. Kane (Annandale, VA.: Speech Communication Association, 1981), p. 104.

[34]Zemel v. Rusk, 381 U.S. 1 at 16-17 (1965). (Emphasis supplied.)

[35]Thomas I. Emerson, The System of Freedom of Expression (New York: Vintage Books, 1970), pp. 1-20. Emerson's initial exposition of his "expression-action dichotomy" had come only two years prior to Zemel v. Rusk. See Thomas I. Emerson, "Toward A General Theory of the First Amendment," Yale Law Journal 72 (1963): 877ff.

[36]Schenck v. United States, 249 U.S. 47 (1919). This case was the birthplace of the "clear and present danger" doctrine.

[37]See generally, Donald M. Gillmor and Jerome A. Barron, Mass Communication Law, 3rd ed. (St. Paul, Minn.: West Publishing Company, 1979), pp. 424-481. See also, "The Newsgathering Process and Constitutional Privilege," in Jerome A. Barron and C. Thomas Diences, Handbook of Free Speech and Free Press (Boston: Little, Brown and Company, 1979), pp. 407-504.

[38]381 U.S. 1, at 18 (1965). The Chief Justice concluded his opinion by ruling that the issue of criminal liability for violating the Passport Act was properly left aside in the lower court rulings. That issue was, however, confronted directly two years after Zemel. In United States v. Laub, 385 U.S. 475 (1967), the Court ruled unanimously that "area restrictions upon the use of an otherwise valid passport are not criminally enforceable under Sect. 215(b)" of the Immigration and Nationality Act of 1952. No First Amendment issues, per se, were raised in Laub.

[39]381 U.S. 1, at 21-22.

[40]381 U.S. 1 at 23-26. Douglas further documented his dissent by invoking a lengthy series of precedents requiring application of the "less drastic means" test when First Amendment rights are involved in government regulation.

[41]381 U.S. 1 at 39-40.

[42]Philip Agee, Inside the Company: CIA Diary (New York: Stonehill Publishing Co., 1975), p. 599.

[43]Quoted in Haig v. Agee, 453 U.S. 280, at 285. Despite these and other similar incidents, the government did not allege "that Agee has specifically incited anyone to commit murder." They did, however, argue that Agee's actions could "result in someone's death" and that at a minimum, his conduct "markedly increased and likelihood of individuals so identified being the victims of violence." Ibid.

[44]Agee v. Vance, 483 F. Supp. 729 (D.C. 1980).

[45]Agee v. Muskie, 203 U.S. App. D.C. 46, 629 F.2d 80 (1980). The Agee case spanned the terms of office of three Secretaries of State: Vance, Muskie, and Haig.

[46]Haig v. Agee, 453 U.S. 280, at 290.

[47]Califano v. Aznavorian, 439 U.S. 170, at 176 (1978). See note #4 above for a comment on this case.

[48]Hans Kelsen is an influential legal philosopher who identifies "grundnorms" as those fundamental values and principles which are capable of sanctioning, in some cases, entire legal systems. See Kelsen, General Theory of Law and State (1945).

[49]453 U.S. 280 at 308-309. Emphasis supplied. Burger's reference to Agee's contract with the government was to his oath of secrecy taken upon employment by the CIA many years before. The validity of such agreements had been recently upheld in Snepp v. United States, 444 U.S. 507 (1980) which ruled that the "Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." The case involved Frank Snepp, another ex-CIA agent who had gone public.

[50]Haig v. Agee, 453 U.S. 280, at 319. (Emphasis supplied)

[51]Haig v. Agee, 453 U.S. 280, at 320-321. From the beginning of the case, Agee had conceded all factual claims by the Secretary of State regarding the results of his communication behavior, preferring instead to base his case on face invalidity of the revocation. In retrospect, the wisdom of this decision, made by Agee's attorney Melvin Wulf, is questionable. Had Agee disputed the government's factual claim, as Brennan's dissent hinted he should have, there is a possibility that the matter would never have gone beyond the stage of administrative hearings, to which Agee was entitled. As Nathan Lewin wrote in The New Republic, Agee's decision to fight it out on broad constitutional, rather than narrow factual, grounds required "all the courts--from Judge Gesell up to the Supreme Court" to address "an abstract legal" question instead of a merely factual one. Nathan Lewin "The Supreme Court's Travel Bug," The New Republic, July 25, 1981, pp. 17-18.

[52]George Will, "'Free Speech' Refuge of Scoundrels," Raleigh Times, July 8, 1981, p. A4.

[53]Yale Kamisar, "The Agee Decision," New York Times, July 28, 1981, p. A15.

[54]Lewin, pp. 19-20. These ad hominem attacks on Agee had begun at least as early as oral argument in the Supreme Court, when Associate Justice Byron White remarked that if the respondent "were anyone but Philip Agee he'd have no trouble winning his case." Quoted in Harvard Law Review 95 (1981), p. 211.

[55]Philip Agee, "I Don't Need a Passport," New York Times, July 27, 1981, p. A15.

[56]Chafee, pp. 194, 196, 200.

[57]Emerson, The System of Freedom of Expression, p. 95.

[58]Laursen, pp. 903, 920, 926.

[59]Ibid., p. 929.

[60]Note, "The Right to Travel," Harvard Law Review 95 (1981), p. 204-205.

[61]Ibid. p. 210.

[62]Capassakis, p. 1190.

[63]"Intelligence Identities Protection Act of 1981," Senate Report No. 97-201 (Washington, D.C.: U.S. Senate, 97th Congress, 1st Session), p. 7.

[64]"Intelligence Identities Protection Act of 1982: Remarks on Signing H.R. 4 into Law, June 23, 1982," Weekly Compilation of Presidential Documents,

Volume 18, No. 25 (Washington, D.C.: United States Government Printing Office, June 28, 1982), p. 831.

[65]"'Naming Names' Made Illegal," Civil Liberties Alert 5 (July, 1982), p. 4.

[66]"House and Senate OK Spy Names Bill," The News Media & The Law (June/July, 1982), p. 49.

[67]Untitled Draft, The News Media and the Law (September/October, 1982).

[68]"An Intelligence Identities Protection Act," Human Rights Internet Reporter 7 (November-December 1981), p. 435.

[69]Executive Order No. 12,211, 45 Fed. Reg. 26, 685 (April 21, 1980. See also New York Times, June 2, 1980, p. A1.

[70]New York Times, January 8, 1981, p. A6.

[71]Quoted in Kamisar, "The Agee Decision," p. A15.

THE MIMIC-WAR AT MIAMI: A CASE STUDY OF 19th CENTURY SPEAKER BANS

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Historians of American higher education consistently stressed the importance of undergraduate literary and debating societies during the eighteenth and nineteenth centuries. David Potter chronicled the rise of the societies founded during the colonial era, but we can find no comparable comprehensive study of the colleges founded after 1789.[1] Until such a study appears it would be overly sanguine to generalize, as did Brubacher and Rudy, that "such societies provided an outlet where student discussion could develop without restraint."[2] Restraint in the late antebellum period occurred at several institutions, and usually took the form of demands by faculty, administrators, or governing boards of the university for approval of outside speakers. While the pervasiveness of such interference by university authorities remains difficult to establish, the restraints clearly foreshadowed the struggle of American undergraduates a century later for the right to invite controversial speakers to their campuses without prior approval.[3]

The divisions between students and faculty often mirrored the increasingly bitter divisions of an America "slouching towards" civil war; however, tension between faculty and literary societies rarely created a problem in the early nineteenth century. At Rutgers College, members of the faculty founded the Philo and Peitho societies in 1825. Even though those founders also wrote the early constitutions, the Rutgers societies operated "essentially of student control."[4] Within a decade, though, that cordial relationship deteriorated. "The [Philoclean] society thought that its privileges and self-government were in some way encroached upon by the faculty; and the somewhat sharp interchange of ideas continued until the trustees entered in and at their intervention, the society by a majority of two yielded the point at issue."[5]

As Americans began to settle the Northwest and Louisiana territories, they also founded colleges and universities. Literary societies became as important to those frontier institutions as to their older sisters in the original thirteen states. Thomas D. Clark said of Indiana University in the 1830's that "literary societies were as necessary institutional adjuncts as sports and fraternities came to be in the twentieth century."[6] In spite of that importance, Indiana provided a parallel to the struggle at Rutgers. "Frequently issues arose between society members and the faculty and, sometimes, between the societies and the Board of Trustees, as to who had ultimate control of the organizations. On one or two occasions, these disputes brought up fundamental questions of freedom of speech within the university community itself."[7]

Students enjoyed extensive freedom in choosing their topics and often debated matters of national importance. As early as 1806 the slavery issue was debated at Washington and Jefferson College in Pennsylvania;[8] the War of 1812, the Mexican War, nullification, immigration, capital punishment, religion, and states' rights were among the controversial issues studied and debated by society members throughout the nation. Even in Georgia, as late as 1859, students debated the economic validity of slavery.[9]

Society members researched avidly, and the private libraries of many literary societies often exceeded those of the colleges.[10] They did not, however, limit their research to books and journals; it became customary to invite outside speakers to address the societies. At Washington and Jefferson College, for example, clergymen, teachers, and "businessmen from nearby and from as far away as Newark and Philadelphia spoke to the students on general college occasions or

at the literary society meetings."[11]

Outside speakers sometimes recruited from the ranks of the various societies' honorary members also appeared. The societies consistently elected prominent individuals to honorary membership; such honors were usually taken seriously by the recipients. At Rutgers those honorary members as well as distinguished society alumni received invitations to address the societies during commencement week.[12] The honorary memberships often resulted in a linking of opposites; for instance, at Washington and Jefferson College John Quincy Adams and Andrew Jackson, bitter rivals for the presidency, were members of Phio while William H. Seward and Jefferson Davis were honorary members of the Franklin Society.[13]

As at Rutgers, many societies conducted special celebrations during commencement week. Although they tended to be contentious opponents during the academic year, the societies often joined their ceremonies during commencement and invited a speaker in addition to the commencement speaker who addressed the entire graduating class.[14] Since societies opened their ceremonies to the public, we cannot always distinguish between commencement speakers and the society-sponsored guest speakers.

Another event, the "exhibition," also drew outside speakers to the campus. On the occasion of a public exhibition, members displayed their rhetorical skills and prominent outside speakers helped attract public attention and attendance. At the University of Missouri such exhibitions took place off campus at the Columbia courthouse until the familiar pattern of conflict brought the societies under faculty control.[15]

On at least one occasion the literary societies fell into disrepute because of nonpolitical issues. At Michigan's Hillsdale College the Philogrammation and Eunomian societies were forced to disband in 1858 because the faculty disagreed with the policy of the societies to allow women to join.[16] Such extreme measures were not the case at Rutgers nor Indiana nor at Missouri where, around 1850, "certain unnamed evils" precipitated a demand that the societies' meetings and exhibitions "be under the charge of the faculty." The Missouri societies denied that the faculty possessed jurisdiction on the grounds that they were incorporated bodies, but yielded nonetheless after a petition to the University's Board failed.[17]

The potential for conflict seems clear; the faculty and administrators feared the political repercussions possible if the public inferred from the presence of controversial speakers on campus an endorsement of those speakers' beliefs or political positions by the university. Violence marked life in the mid-nineteenth century and the desire of administrators and faculty to avoid possible disputes by acquiring control over the literary societies was natural. As Clark noted, however, the societies regarded themselves and their quarters as "secluded islands where members, within certain bounds, could cast off the parental tether of the faculty and feel free to express themselves. Since there were no intercollegiate sports or other forms of extra-university rivalry, members took an almost militant pride in their affiliation, and they guarded their independence with Jacksonian fierceness."[18]

A consistent and visible pattern of disputes existed at Indiana, Missouri and Rutgers. The literary society members fought the faculty's demand for supervision directly, and often appealed the loss of their dearly held rights to the institutions' governing boards. (The process by which the boards became involved either in addition to or in place of the faculty has yet to be established.) The societies accepted their fate and capitulated to the faculty only after all their efforts failed. Although the specific details which caused such conflicts varied from campus to campus and society to society, we suspect a pattern much like the events at Miami University in the years 1845-1848. There the fight split the faculty and nearly forced the resignation of President Erasmus D. McMaster.

Although founded in 1809, Miami University admitted its first class some

fifteen years later in November, 1824. The faculty of three (Robert H. Bishop, John E. Annan, William Sparrow) began with twenty students of whom four were in the Junior class, three in the Sophomore class, five in the Freshman class, and eight in the Grammar School. "In July, 1826, when the first catalogue was published by the University, there was a total of 111 students. . . ."[19] Exactly one year after the first class entered, thirteen students formed the first literary society on campus.

The establishment of the Erodelphian Literary Society began on November 9, 1825. "The propriety of forming a literary society being suggested, it was resolved by a number that a meeting should be held for this purpose."[20] At their first meeting the members appointed temporary officers and selected a committee of three to draft the form of a constitution. On November 18 the membership received and approved the constitution,[21] elected permanent officers, and established a new committee of three for preparation of the by-laws. The Erodelphian Literary Society became duly constituted on December 2, 1825, immediately after the members accepted the by-laws. Six years later, in 1831, the Ohio Legislature incorporated the Society.[22] The state charter, like those of the University of Missouri's societies, served as the source of power for the Society's struggle with the faculty in 1845.

A second group, subsequently named the Union Literary Society, held its first meeting on December 14, 1825. "For the cultivation of the moral and intellectual facilities of the mind we on the 14th day of December 1825, formed a literary society for our mutual benefit."[23] They, too, chose a committee of three to design and submit a constitution and by-laws, both of which received approval by January 12, 1926. In 1840 the State Legislature chartered the Society, and thus granted them the same power as the Erodelphian Society.

The Miami societies followed the pattern of other societies that held parliamentary business sessions, heard and criticized the speeches and debates of their own members, competed with other societies for academic honors, amassed libraries, clung "to their independence from faculty interference," and behaved "like little republics."[24] Upham described their activities: "Boys declaimed and orated and struggled in debate because they wanted to and couldn't help it . . . oratory was then the fashion, taking the place of turned-up trousers and brindle bull dogs."[25]

Because of the charters from the State of Ohio, neither the Erodelphian nor the Union Literary societies felt any obligation to either the Board of Trustees or the faculty of the university. They did not purposely antagonize the faculty, nor want to bring discredit to the institution:[26] but they did, as Potter and Clark both stated, cling to their independence, an attitude which led, after five academic generations, to open conflict.

The initial challenge came from the faculty on May 30, 1845. The Erodelphian Society minutes contain the notation that "a communication from the faculty was received and read. . . ."[27] The faculty insisted that the names of all proposed speakers, particularly for the commencement exercises, were to be submitted for approval. If rejected by the faculty, the Society would be obliged to select alternative speakers.[28] The Erodelphians appointed a committee to prepare a response to the faculty. From May 30 on the committee offered a number of reports for the approval of the Society. Finally, on the afternoon of July 11, 1845, the Erodelphians adopted a preamble and resolutions: "Therefore resolved, that we do adhere to the opinions expressed in our previous communication to the faculty, viz that we acknowledge the full and implicit power of the faculty, over all commencement exercises, but from this premise we cannot infer that the faculty have the right of demanding our speakers for their appearance or rejection before they should be informed of their election."[29]

Meanwhile, the Union Literary Society received a similar notice, also recorded on May 30. On June 6 they too appointed a committee to submit resolutions for forwarding to the faculty.[30] The committee returned on June 13, and their report denied the faculty the right to interfere in Union Society

affairs. The membership adopted the report and sent it to the faculty.[31] One week later the faculty responded by reaffirming its earlier statement.[32] The Union Society, in turn, reaffirmed its position in a determined answer to the faculty.[33]

Moreover, the Union Society minutes indicate a joint committee meeting with the Erodelphian Society. Although records fail to show agreement by the two organizations on a single course of action, each group continued to resist the ruling. They also continued their normal activities. On Fridays the members read their compositions and declamations in the afternoon and debated in the evening. Henry Mitchell MacCracken, chancellor of New York University and Miami graduate of 1857, reported that professors were less important for many students than their Society. For the men, claimed MacCracken, "'no classroom was so attractive as his Literary Hall; no wit or humor more talked of than that which flashed out during the attrition of Society debates'." The men of the Societies prepared for the law, ministry, and teaching, and "the Literary Halls were their bench, their pulpit and their classroom."[34]

Meanwhile, the early weeks of July were quiet. The faculty considered the problem, but found themselves unable to agree. Professors John McArthur, James C. Moffat, Thomas Matthews, and Robert H. Bishop, Jr., wished to let the matter rest. Dr. McMaster, President of the University, together with Professor Orange Nash Stoddard refused to consent. Joseph Brady, a member of the Union Society, wrote that "As a majority of the faculty were now with us, we resolved to have nothing more to do with it." The faculty rift grew wider. Dr. McMaster remained adamant and threatened to resign. On July 24 a majority of the faculty met with three members of each Society. They urged the societies to submit the names of their guest speakers for the upcoming commencement. Such an action would be understood, claimed the faculty, as an attempt at reconciliation and not as a yielding of principle. The faculty committee guaranteed no objections would be raised against the speakers.[35]

On July 25 each organization met to deliberate the recent development. The Union Society, after considerable debate, sent a compromise resolution agreeing to submit the names of their candidates if the faculty, in turn, provided reasons for any rejections. Moreover, a majority vote of the Society would overrule the faculty veto and the original invitation would be extended.[36]

The members of the Erodelphian Society also showed a compromising attitude and passed the following resolution: "that in a spirit of conciliation the request of the faculty communicated to this Society be granted for the present; provided that said concessions be not so construed as to commit the society in its future action on the subject." Later that same evening a motion instructing the Corresponding Secretary to send a copy of the resolution to the faculty lost. The members had changed their minds. On July 26 they repealed the resolution entirely. Two days later they rewrote the resolution and passed it.[37]

The Union Literary Society made contact with the faculty. Mr. Brady made the following entry in his diary: "Mr. Jones, our Corresponding Secretary, gave to Dr. McMaster a copy of the resolution we had passed. Immediately upon reading it, without laying it before the Faculty at all, he wrote an answer saying, that it did not yield the principle for which the Faculty contended, and could not be received. He did not even do us the honor to send us a formal letter, but subjoined his answer in a few sentences at the foot of our resolution."[38] Dr. McMaster's reply was officially received by the Society on August 8, 1845.[39]

Yet throughout this period of the disagreement guest speakers continued to appear. "I heard the address of Mr. James W. Taylor of Cincinnati, this evening, delivered before the Erodelphian Society. The subject of his Address was 'Reverence and Reform.' I did not think his address worthy of the occasion. It seemed dull and lifeless, not full of energy and spirit to rivet the attention of the hearers."[40] By addressing one of Miami's Societies Mr. Taylor joined a group whose members included Thomas Smith Grimke, Edward Deering Mansfield, Daniel Drake, Thomas Ewing, Alexander Campbell, and Lyman Beecher.[41]

When the students returned in the Fall of 1845 the Societies resumed their normal business. Speeches were delivered on Energy, and Slavery; and debates were held on "Capital Punishment," "Are Theaters Injurious to the Community," "Should a Representative be Bound by the Will of the Constituents," and "Which Affords the Greater Field for Eloquence the Pulpit or the Bar."[42] The year 1845 ended without further comment on the struggle.

With the exception of June 5, when the Union Society selected a committee to determine the feelings of the faculty,[43] the year 1846 passed with the societies maintaining their typical schedule. Debates ranged from "Should the United States Upon Any Consideration Engage in a War to Maintain its Right to Oregon," to "Was Brutus Justifiable in the Assassination of Caesar." In August, the Senior Class chose a variety of topics for its commencement addresses. Among them were "Political Permanency and Progress," "Oratory the Fruit of Labor," "Our Country," "Progress of Free Principles," "Law Suited to Man," "Elements of a Great State," and "The Influence of Christianity." The tension lessened, and according to Mr. Brady, "A better feeling exists between the students and Faculty than did one year since."[44]

The annual exhibitions were as important at Miami as at other colleges. Regardless of other problems, the societies continued this practice in 1847. The Erodelphian Exhibition occurred on March 9, and the Union Exhibition on March 10.

Then on October 8, 1847, the Erodelphian Society received word from the Board of Trustees regarding the ongoing conflict. On October 15 the Erodelphians established a committee to determine the validity of the letter, of which no copy survives. One week later the committee reported the letter to be authentic, and the Society instructed the Corresponding Secretary to return the letter to the Board.[45]

The commencement exercises of 1847 again revealed the diversity of topics chosen for the occasion. They differed considerably from the previous summer, and included "The Literature of the West," "The Influence of Britain on Human Interests," "The Saracens," "The Literature of France," "Constitutional Liberty in Prussia," and "The Social Organization of Ireland."[46]

In the summer of 1848 the Union Society began its last campaign. Members chose a committee to draft a letter to the Board of Trustees, and the Secretary requested copies of all correspondence between the Faculty and the Society. Two weeks later the draft was given, accepted, and forwarded to the Board. In the Fall the Board responded reaffirming its original position. Once again the Society attempted to draw up resolutions to the Board, but the motion lost.[47] The Miami Union Literary Society gave up the fight and yielded to the Board's demands for approval of guest speakers.

Meanwhile, the Erodelphian Society also sent a letter to the Board of Trustees in July, and received the Board's response on the same day as the Union Society. They reacted laying the matter "under" the table.[48] They, too, capitulated and yielded to the Board.

Although the conflict had come to an end, a final note was added one year later. The Erodelphian Society received a letter from the faculty thanking them for sending in the names of their proposed speakers. Three days later the Erodelphians met and attempted to impeach the Corresponding Secretary, Mr. Ardivan W. Rogers, for submitting the names. On December 7 the trial was held; the verdict--not guilty.[49]

The struggle ended. New members in the Societies, less concern with non-interference, the growing strength and importance of fraternities all contributed to the capitulation. Yet many of the members of the societies went on to importance and contributed significantly to their nation's history. Charles Anderson, who became Governor of Ohio in 1863: Samuel Laws, who became Vice President of the New York Gold Exchange, invented the ticker tape, and was President of the University of Missouri from 1876 to 1889; Charles Hardin, who

became Governor of Missouri in 1876; and, Ben Harrison, who became the twenty-third President of the United States, all participated in Erodelphian and Union affairs. In addition, the records of societies show acceptance of honorary membership by Washington Irving, John Quincy Adams, Henry Clay, Andrew Jackson, Lyman Beecher, Daniel Webster, James Madison, Robert Dale Owen, Salmon P. Chase, John C. Calhoun, James Buchanan, John Marshall, Edward Everett, James G. Birney, and others.[50] The literary critic and historian, Alfred Horatio Upham, in an attempt to derive some utility from the bitterness, said "Pray do not imagine that throughout their whole career these societies have continued daring the faculty to tread on their coat-tails. . . . Even in the controversy . . . there was experience and growth. The very key to existence in the literary hall is strife and rivalry, the mimic war-fare that makes ready for the battle of life."[51]

And for later generations of students, for whom literary societies were lessons in history classes, the struggle for the free expression of ideas would arise again and again.

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[2]John E. Brubacher and Willis Rudy, Higher Education in Transition: An American History 1636-1956 (New York: Harper & Row, 1958), p. 47.

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[4]William H. S. Demerest, A History of Rutgers College, 1766-1924 (New Brunswick: Rutgers College, 1924), p. 298.

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[6]Thomas D. Clark, The Early Years, vol. 1 of Indiana University, Midwestern Pioneer (Bloomington: Indiana University Press, 1970), p. 169.

[7]Clark, p. 170.

[8]Helen Trumbel Waite Coleman, Banners in the Wilderness: Early Years of Washington and Jefferson College (Pittsburgh: University of Pittsburgh Press, 1956), p. 169.

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[10]Brubacher and Rudy, pp. 94-95.

[11]Coleman, p. 173.

[12]Demerest, pp. 299-300.

[13]Coleman, p. 172.

[14]Demerest, p. 300.

[15]Frank F. Stephens, A History of the University of Missouri (Columbia: University of Missouri Press, 1963), p. 180.

[16]Willis F. Dunbar, The Michigan Record in Higher Education (Detroit: Wayne State University Press, 1963), p. 180.

[17]Stephens, pp. 103-104.

[18]Clark, pp. 169-170.

[19]James H. Rodabaugh, A History of Miami University From Its Origin To 1845 (unpublished Master's thesis, Miami University Library, 1933), pp. 82-83.

[20]Minutes, Erodelphian Literary Society (a manuscript in the M.U. Library), November 9, 1825..

[21]Minutes, E.L.S., November 18, 1825.

[22]The Laws of Miami University for the Government of the Faculty and Students (Rossville, Ohio: J.M. Christie, 1843), p. 69.

[23]Minutes, Union Literary Society (a manuscript in the M.U. Library), December 14, 1825.

[24]Potter, pp. 70-71.

[25]Alfred H. Upham, Old Miami: The Yale of the Early West (Hamilton, Ohio: Republican Publishing Co., 1909), pp. 53-54.

[26]Minutes, E.L.S., August 8, 1845.

[27]Minutes, E.L.S., May 30, 1845.

[28]Joseph P. Brady, A Journal Kept At Miami University 1843-1848 (manuscript in the M.U. Library). The essence of the letter can be found in Brady's diary. He was a student at Miami from 1843-1848, and a member and officer of the Union Literary Society. He devoted several pages of commentary to the struggle with the faculty, all recorded on July 29, 1845.

[29]Minutes, E.L.S., July 11, 1845.

[30]Minutes, U.L.S., June 6, 1845.

[31]Minutes, U.L.S., June 13, 1845.

[32]Minutes, U.L.S., June 20, 1845.

[33]Minutes, U.L.S., June 27, 1845.

[34]Walter Havighurst, The Miami Years 1809-1959 (New York: G.P. Putnam's Sons, 1958), pp. 73-74.

[35]Brady, July 29, 1845. Brady was present at the meeting.

[36]Minutes, U.L.S., July 25, 1845.

[37]Minutes, E.L.S., July 25 and 26, 1845.

[38]Brady, July 29, 1845.

[39]Minutes, U.L.S., August 8, 1845.

[40]Brady, August 12, 1845. James Taylor was a consular officer, author, and journalist. He established the Cincinnati Morning Signal in 1846, and was a representative to the second Ohio Constitutional Convention in 1850-51, and was head of the Ohio State Library from 1854 to 1856.

[41]Havighurst, pp. 78-79, and Rodabaugh, p. 112.

[42]Brady, October 24, 31, November 28, December 12, 1845.

[43]Minutes, U.L.S., June 5, 1846. The results of that investigation were never recorded.

[44]Brady, April 10, May 8, August 13, 1846.

[45]Minutes, E.L.S., October 8, 15, 22, 1847. If the Union Literary Society received a similar letter they neglected to mention it in their minutes. In fact, the situation is totally ignored throughout 1847 by the Union Society.

[46]Brady, August 12, 1847.

[47]Minutes, U.L.S., July 21, August 4, October 20, 27, 1848.

[48]Minutes, E.L.S., July 28, October 20, 1848.

[49]Minutes, E.L.S., November 10, 13, December 7, 1849.

[50]Havighurst, p. 76, and Rodabaugh, pp. 101-102. (Many of the above named men were also honorary members at other colleges. See Coleman, p. 172.)

[51]Upham, pp. 88-89.

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Civil Liberties. 22 East 40th Street, New York, NY: The American Civil Liberties Union.

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Free Speech Yearbook. 5105 Backlick Road, Annandale, VA 22003: Speech Communication Association.

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Media Law Notes. 431 Murphy Hall, University of Minnesota 55455: Law Division, Association for Education in Journalism.

Media Law Reporter. 1231 25th Street N.W., Washington, DC 20037: Bureau of National Affairs.

Newsletter on Intellectual Freedom. 50 East Huron Street, Chicago, IL 60611: Intellectual Freedom Committee, American Library Association.

Student Press Law Center Report. 1750 Pennsylvania Avenue N.W., Washington, DC 20006: The Reporters Committee for Freedom of the Press.

The News Media & the Law. 1750 Pennsylvania Avenue N.W., Room 1112, Washington DC 20006: The Reporters Committee for Freedom of the Press.

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Court Cases

Board of Education v. Pico, 73 L.Ed.2d 435. 102 S.Ct. 2799 (1982). In an issue regarding a school board's removal of books from the public school library, the High Court held that the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library, that the First Amendment therefore imposes a limitation on the local board's discretion to remove books from the library. 5-4 decision with Burger, Powell, Rehnquist, and O'Connor dissenting.

Brown v. Hartlage, 71 L.Ed.2d 732, 102 S.Ct. 1523 (1982). The state has a legitimate interest in upholding the integrity of the electoral process itself, but may not restrict speech in violation of the First Amendment. 9-0 decision.

Citizens Against Rent Control v. City of Berkeley, 70 L.Ed. 492, 102 S.Ct. 434 (1981). Municipal ordinance placing a $250 maximum limitation on contributions to committees supporting or opposing ballot measures was held violative of First Amendment rights of association and speech. 8-1 decision with White dissenting.

Clements v. Fashing, 73 L.Ed.2d 508, 102 S.Ct. 2836 (1982). Texas constitutional provision limiting a public officials' ability to become a candidate for another public office does not violate the First or Fourteenth Amendments. 5-4 decision with Brennan, Marshall, Blackmun and White dissenting (White on Fourteenth Amendment only).

Cooper v. Mitchell Brothers, 70 L.Ed.2d 262, 102 S.Ct. 172, 7 Med.L.Rptr. 2273 (1981). The First and Fourteenth Amendments do not require that a city prove beyond reasonable doubt that the motion pictures shown in a theater are obscene in a public nuisance abatement case. 6-3 decision with Brennan, Marshall, and Stevens dissenting.

Federal Bureau of Investigation v. Abramson, 72 L.Ed.2d 376, 102 S.Ct.2054, 8 Med.L.Rptr. 1561 (1982). The high court held that information initially contained in a record made for law-enforcement purposes, continues to be exempt from disclosure under the Freedom of Information Act even after that information is reproduced or summarized in another document prepared for non-law-enforcement purpose. 5-4 decision with Blackmun, Brennan, O'Connor and Marshall dissenting.

Globe Newspaper Co. v. Superior Court, 73 L.Ed.2d 248, 102 S.Ct. 2613, 8 Med.L. Rptr. 1689 (1982). A state statute that requires exclusion of the press and the general public from the courtroom, under all circumstances, during the testimony of a minor in a sex-offense trial violates the First Amendment. 6-3 decision with Burger, Rehnquist and Stevens dissenting.

In Re R.M.J., 71 L.Ed.2d 64, 102 S.Ct. 929, 7 Med.L.Rptr. 2545 (1982). Missouri Supreme Court's rules regulating advertising by lawyers violates attorney's First Amendment rights, with exception of misleading material. 9-0 decision.

International Longshoremen's Association v. Allied International, Inc. 72 L.Ed. 2d 21, 102 S.Ct. 1656 (1982). Refusal by longshoremen's union to unload cargoes shipped from the Soviet Union in protest against the Afghanistan invasion was held to be an illegal secondary boycott under the National Labor Relations Act, and was not a protected form of communication under the First Amendment. 9-0 decision.

Larson v. Valente, 72 L.Ed.2d 33, 102 S.Ct. 1673 (1982). Minnesota's charitable contributions Act, providing that religious organizations which receive more than half of their total contributions from their members or affiliated organizations are exempt from the registration and reporting requirements of the Act, grants denominational preferences which violates the Establishment Clause of the First Amendment. 5-4 decision with White, Rehnquist, Burger and O'Connor dissenting on procedural issue.

NAACP v. Claiborne Hardware Co., 73 L.Ed.2d 1215, 102 S.Ct. 3409 (1982). The First Amendment protects from damage liability nonviolent boycott participants engaged in politically motivated boycotts designed to effectuate other rights guaranteed by the Constitution, but the First Amendment does not bar recovery from those engaged in violence or threats of violence for losses proximately caused by their unlawful conduct. 8-0 with Marshall not participating.

New York v. Ferber, 73 L.Ed.2d 1113, 102 S.Ct. 3348, 8 Med.L.Rptr. 1809 (1982). State statute prohibiting the knowing promotion of sexually explicit performances by children under 16 by distribution of material depicting such performances does not violate the First Amendment inasmuch as child pornography falls outside constitutional protection if it involves a visual depiction of sexual conduct by children without serious literary, artistic, political, or scientific value. 9-0 decision.

Village of Hoffman Estates v. Flipside, Hoffman Estates Inc., 71 L.Ed 362, 102 S.Ct. 1186 (1982). Municipal ordinance which requires a license to sell "items designed or marketed for use with illegal cannabis or drugs" does not infringe the First Amendment rights of the merchandiser or other parties since it does not regulate any expression, only the license to sell merchandise. 8-0 with Stevens not participating.

Widmar v. Vincent, 70 L.Ed.2d 440, 102 S.Ct. 269 (1981). Refusal by state university to grant a student religious group access to use university facilities generally open to other student groups is unjustifiable content based exclusion of religious speech since state regulations should be content-neutral. 8-1 decision with White dissenting.